Supreme Court, U. S.
FILED
OCT 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-587

WILLIAM GIBBONS, TRUSTEE OF THE PROPERTY OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR,

Petitioner,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., AND INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., AND INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner William Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company,* Debtor in reorganization under Section 77 of the Bankruptcy Act (11 U. S. C. § 205),** respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on July 1, 1976.

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* Petitioner is hereafter referred to as "Trustee."

** References to 11 U. S. C. § 205 are hereinafter made by citations to Section 77 of the Bankruptcy Act.

OPINIONS BELOW.

The decision of the United States District Court for the Northern District of Illinois, Eastern Division, is unreported and is printed in the Appendix (A1). The opinion of the Court of Appeals for the Seventh Circuit is reported at 537 F. 2d 906 (7 Cir. 1976) and is printed in the Appendix (A10).

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 1, 1976 and the petition for rehearing filed by Trustee was denied on August 3, 1976 (A27).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Has the Seventh Circuit erred in holding that it was within the contemplation of Congress when it enacted Section 77 of the Bankruptcy Act granting to the Trustee the power to operate the business of a railroad debtor "subject to the control of the judge and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act," that the Commission was thus clothed with authority to supersede and circumscribe by its administrative orders the exclusive jurisdiction of the court under the Bankruptcy Act to determine the relative rights, liabilities and priority status of the claims of creditors in railroad reorganization proceedings?

2. Has the Seventh Circuit erred in upholding as superseding authority over any relevant receivership or bankruptcy law, administrative orders of the Interstate Commerce Commission the effect of which is to create a priority status for unsecured per diem claims of railroads arising in the period prior to the filing of the reorganization proceedings and

to require their immediate payment by a reorganization trustee as costs of administration out of his current operating revenues?

3. Has the trustee of a railroad in reorganization been deprived of property of the debtor's estate without due process and in violation of the Fifth Amendment when without specific Congressional authority or mandate of the Supreme Court, general unsecured claims are accorded a cost of administration status payable immediately out of a railroad's current operating revenues.

STATUTORY PROVISIONS INVOLVED.

Section 77(a), (b), (c)(2), (c)(7), (e), and (l) of the Bankruptcy Act are set forth in the Appendix (A53). Sections 49 U. S. C. § 1(4), 1(10), 1(11), 1(14)(a) and 1(17)(a) of the Interstate Commerce Act are set forth in the Appendix (A64).

STATEMENT OF THE CASE.

On March 17, 1975, the Chicago, Rock Island and Pacific Railroad Company commenced proceedings for its reorganization under Section 77 of the Bankruptcy Act in the District Court for the Northern District of Illinois. Petitioner William Gibbons was appointed Trustee of the debtor railroad on March 28, 1975, and is presently in possession of its properties and is conducting its operations in the pending reorganization proceedings.

On April 25, 1975, two separate but related controversies were presented to the District Court for disposition, both of them affecting the status of certain *pre*-reorganization interline accounts, hereinafter described. Interline accounts arising in the period following the filing of the reorganization proceeding were not placed in issue and were admitted costs of the Trustee's operation which were to be paid in cash when due and out of the Trustee's current operating revenues. Also excluded from the

two controversies presented were freight and passenger accounts which also were to be paid by the Trustee on a cash and mandatory basis as costs of his administration, regardless of whether they arose in the *pre*-reorganization period, the Trustee having conceded that such accounts were trust funds under the doctrine established in the Third Circuit decision of *In re Penn Central Transportation Co.*, 486 F. 2d 519 (3 Cir. 1973), *cert. denied*, 415 U. S. 990 (1974).

The first of the controversies so presented specifically dealt with the question of whether a trustee should be permitted to continue to defer payment of pre-reorganization per diem (car hire) balances due the respondent interline railroads. The Trustee took the position that the District Court's sole and exclusive jurisdiction and authority derived under Section 77 of the Bankruptcy Act over the Debtor's property and its equitable distribution empowered the court to leave it to the Trustee's discretion whether or not such pre-reorganization accounts should be deferred or paid. The respondent railroads and the Interstate Commerce Commission took the opposite view predicated upon their contention that a reorganization court's powers are superseded by Commission orders entered pursuant to the Interstate Commerce Act (A64-67), which they argued have the overriding force of federal law so that in their uniform application to all railroads as they relate to the time and method of settling per diem accounts, require a trustee to pay per diem balances on a mandatory basis, regardless of when they arose. The District Court upheld the Trustee's position in the first of a two-part opinion (A2) concluding that the court's exclusive jurisdiction to determine the status and priority of claims empowered it to authorize its Trustee to defer the payment of pre-reorganization per diem balances. It should be noted that the per diem account *balances* referred to in the first part of the District Court's opinion dealt with debit balances owed by the debtor railroad to the respondent interlines after a netting or set-off process prescribed by rules of the Association of American Railroads (AAR).

The second of the related controversies presented to the District Court involved the Trustee's position that the netting out or balancing process of settling separate pre-reorganization interline accounts as prescribed by rules of the AAR for per diem, switching, loss and damage, car repair and trailer rentals, constituted a set-off which came within the court's prohibition against all set-offs whether or not agreed upon in the subject AAR rules. The Trustee argued that he was thus entitled to demand and receive payment of the gross credits in each of the said interline accounts rather than the net balances for which settlement is ordinarily made under the AAR rules. The respondent railroads took the position that the AAR rules created an agreed system of "mutual open accounts" between the Debtor and each of the interline railroads which extinguished the debits and credits prior to reorganization, leaving only a net balance which was either owed to or by the Trustee depending on whether the balance thus created was a debit or credit. The District Court upheld the contention of the interline railroads in the second part of its opinion (A5) ruling that the agreement of the parties had produced a conceptional cancellation or extinguishment of debt prior to the commencement of the reorganization proceeding which the court was powerless to reach by its restraint against set-off.

Appeals were taken to the Seventh Circuit by the interline railroads and the Interstate Commerce Commission from the first part of the District Court's decision and by the Trustee from the second part of the decision. The Seventh Circuit in its decision reported in 537 F. 2d 906 (7 Cir. 1976) (A10), upheld both positions of the respondent interline roads by: (1) reversing the reorganization court's opinion that the Trustee could defer payment of pre-reorganization per diem balances; and (2) affirming the reorganization court in its finding that it was powerless to prevent or undo set-offs which had conceptionally occurred through agreement of the parties by a "mutual open accounts" extinguishment of debt.

The present petition for Writ of Certiorari seeks a review of both parts of the Seventh Circuit's opinion and judgment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. The Decision of the Supreme Court Is Necessary to Settle as an Important Question of Federal Law the Clash Between the Jurisdiction and Powers of the Reorganization Court and the Interstate Commerce Commission in Proceedings Under Section 77 of the Bankruptcy Act Which Has Resulted from the Seventh Circuit Opinion.

The Seventh Circuit decision has cast a cloud over the jurisdiction and power of a Section 77 reorganization court to determine the status and priority of claims by holding that such powers are circumscribed and superseded by administrative orders of the Interstate Commerce Commission in the specific area of per diem accounts as they pertain to the priority and payment status of pre-bankruptcy unsecured indebtedness.

The effect of that decision if permitted to stand will be to seriously prejudice the ability of a reorganization court in this and other proceedings to discharge its statutory and equitable power and duty as derived under Section 77 of the Bankruptcy Act to effect a consolidation and protection of the assets of a railroad debtor pending formulation and approval of a plan which does not discriminate unfairly in favor of any class of creditors (Section 77(e) (A60)).

By granting to the Commission the power to determine the status of pre-bankruptcy per diem claims owned by the railroad industry against a debtor in reorganization, the Seventh Circuit has not only failed to observe the statutory limitations placed on the powers and duties of the Commission under Section 77, but of greater importance, it has ignored and circumscribed the jurisdiction and power of the reorganization court so as to effect a serious erosion of the rehabilitative vehicle which Congress provided in enacting that reorganization law. The Seventh Circuit has misplaced the power and control over

a debtor's property and its equitable distribution and over a debtor's rehabilitation which Congress specifically granted to the court and has not otherwise delegated by statute.

The court was given exclusive jurisdiction under Section 77(a) over all of the Debtor's property, wherever located, and in addition, was granted all the powers of an equity receivership (A53). In order to strengthen the reorganization vehicle of Section 77, Congress made absolutely certain that there was no question that the power of the court derived from provisions of the Bankruptcy Act should also apply to railroad reorganizations by providing in Section 77(1) that the court's power and jurisdiction and the rights and liabilities of creditors with respect to the debtor and its property shall be the same as if a decree of adjudication had been entered on the day when the debtor's petition was filed (A64). Being concerned with the equitable distribution of a debtor's property, Congress granted to the court under Section 77(c)(7) exclusive power to pass on the validity of all claims filed against the debtor's estate (A59) and under Section 77(e) gave the court exclusive power to approve a plan of reorganization if it was satisfied that the plan was "fair and equitable" and did not "discriminate unfairly in favor of any class of creditors" (A60).

Significantly, the Interstate Commerce Commission is not included in any of the areas above cited which deal with the exclusive powers of the reorganization court. Yet, the Seventh Circuit has delegated a non-delegable judicial power to the Interstate Commerce Commission to set priorities under its administrative orders and to declare that per diem claims are "super debts" entitled to be paid, not only out of the debtor's general estate, but payable immediately out of the Trustee's current operating revenues as a cost of his operation without any consideration being given to the debtor's economic needs (A18, 19). Since it places pre-bankruptcy per diem on parity with current operating costs, it has the immediate effect of diluting and prejudicing the payment by the Trustee of his current obligations.

This power to set priorities, however, is exclusively by statute in the court unless Congress chooses to legislate any additional priorities which it specifically has done in certain areas and which include the grant of power in one instance to the Commission to make certain findings as a prerequisite to the payment of a priority.[1]

Congress has not chosen, however, to create a preferred status for per diem claims and the Seventh Circuit is not empowered to confer such authority upon the Commission without clear statutory authority. It was argued successfully by the Commission that the provision of Section 77(c)(2) of the Bankruptcy Act (A58) which authorizes the operation of the debtor's business by the trustee "subject to the control of the judge and the jurisdiction of the Commission" should be interpreted as a grant of such authority. Such a broad interpretation, however, places a new dimension on the role of the Commission in Section 77 proceedings since it permits it to establish an instant priority status of claims in the name of public interest without giving consideration to protection of the Debtor's estate, the operation of the Trustee, or the ultimate plan of reorganization.

It is noteworthy in the context of the questions herein presented for review that Congress, in enacting the amendment in 1958 to Section 77(c)(2) with the purpose of insuring that expenditures for needed improvements in railroad facilities be made in the interest of public necessity and safety

1. Cf. Section 77(b) which extends a priority to unsecured claims if entitled to such under equity receivership law (A55); Section 77(c)(2) granting to the Commission authority to determine whether an expenditure out of a debtor's estate relating to public safety is compatible with the public interest and will not impair the ability of a trustee to perform his duties or "interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor" (A58); Section 77(c)(3) authorizing issuance of trustee's certificates with priority over all existing obligations; Section 77(n) granting preferred status to claims of injured railroad employees whether arising *pre-* or *post*-bankruptcy. Section 77(j) granting owners of rolling stock a right of repossession upon contractual default unaffected by the reorganization proceeding.

during a trustee's operation and prior to confirmation of a plan even over the objection of the trustee or the court, delegated to the Commission the duty of first making findings that such expenditures would be compatible with the public interest but would not impair the ability of a trustee in the performance of his duties or interfere with the formulation of a plan.[2] Legislative history on the amendment reveals that the Commission itself, in commenting on the proposed legislation which would delegate new powers to it, correctly admitted that whether control over such economic matters should be transferred from the District Courts to the Commission "was a question of congressional policy" (A71, 73-74).

The Seventh Circuit has apparently ignored its own decision in *In re Chicago & N. W. Ry. Co.*, 121 F. 2d 791, 796 (7 Cir. 1941), wherein it fully examined the role of the courts and the Commission under Section 77 and correctly concluded that neither the scheme of the legislation nor the words of the statute justify the conclusion that the court should ignore the express powers granted to each body by said legislation, or that it should delegate its judicial powers to the Commission by merely approving orders made or offered by the Commission.

This Court has held that a trustee's on-going operation of a debtor's business under Section 77 subjects him to the jurisdiction of the Interstate Commerce Commission and state regulatory bodies with respect to the rendition of service. *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134 (1946); *Smith* v. *Hoboken R. R. Warehouse & S. S. Connecting Co. et al.*, 328 U. S. 123 (1946); *Palmer* v. *Massachusetts*, 308 U. S. 332 (1939). This jurisdiction, however, does not extend to the setting of priorities for one class of creditors supposedly in the public interest but in complete disregard of the mandate of Section 77 and of the debtor's economic and rehabilitative needs.

An important question in the administration proceedings under Section 77 of the Bankruptcy Act has thus resulted from the deci-

2. See footnote 1, *supra*.

sion of the Seventh Circuit which, it is respectfully submitted, may only be settled by this Court. The importance of the question is highlighted by the present economic plight of railroads which has led to seven pending proceedings in the northeast sector and the existence of marginal railroads who may be forced as was Rock Island to seek the rehabilitative vehicle of Section 77. The negative cash impact impact on the Rock Island reorganization through a prospective diminution of its current operating revenues by the creation of a preferred status for railroad pre-reorganization per diem claims without specific Congressional authority, will be measured in millions of dollars as is documented by the record of the Seventh Circuit in the proceedings below.

2. The Seventh Circuit's Decision Is in Conflict with Decisions of the Supreme Court.

In holding that pre-bankruptcy per diem claims have a preferred status payable *immediately* out of a trustee's current operating revenues as costs of his administration, the Seventh Circuit decision is in conflict with the decision of this Court in *Fosdick* v. *Schall*, 99 U. S. 235, (1878) which first stated the "six months rule" and established guidelines for courts of equity to follow in extending priorities or preferences to unsecured claimants who supplied labor, material or services within the six month period prior to the initiation of reorganization proceedings. The doctrine and guidelines so established have been reaffirmed in subsequent decisions of this Court.[3] The rationale of the rule which has persisted throughout all these decisions and of the decisions which then followed in the lower federal courts, is the fair and equitable distribution of the railroad's assets with a preference being extended under certain circumstances and under facts of a particular case to general creditors who supplied goods and services which contributed to the preservation or

3. *Wood* v. *Guaranty Trust Co.*, 128 U. S. 416 (1888); *Southern Railway Company* v. *Carnegie Steel Company*, 176 U. S. 257 (1900); *Lackawanna, etc. Co.* v. *Farmers Loan & Trust Co.*, 176 U. S. 298 (1900).

creation of the fund in the court's custody by keeping the railroad in operation. Inherent, however, in the decisions of this Court and of the lower court decisions on the subject is the requirement that before the six months priority may be paid there must be a determination of the existence of a "current expense" fund out of which payment can be made. This determination is not summary and is based on a studied review of a debtor's financial affairs since the onset of the reorganization proceedings.[4] The presence or absence of such a current expense fund and its sufficiency to meet all of the priorities established under the six months rule, as well as the current costs of a trustees' operation, must consequently await the orderly distribution of a debtor's assets under a plan of reorganization. In reorganization cases under Section 77, this can only occur when all claims have been filed and classified for allowance under Section 77(c)(7) of the Act (A59, 60).

The "six month rule" priorities which were created under equity receivership law in *Fosdick* v. *Schall, supra,* were expressly adopted and codified by Congress under Section 77(b) which declared that unsecured creditors found to be entitled to such a priority "shall be treated as a separate class or classes of creditors" for the purposes of the reorganization proceedings (A55, 57).

The Seventh Circuit's decision thus directly conflicts with both the Supreme Court decision of *Fosdick* v. *Schall* and with Section 77(b) of the Act by failing to observe the equity and statutory requirements for the establishment of priorities and by ordering in the first part of its two-part decision the immediate payment of pre-reorganization per diem out of the Trustee's current operating revenues.

4. Cf. *Southern Railway Co.* v. *Carnegie Steel Company, supra;* and see *In re New York, New Haven and Hartford Railroad Co.*, 278 F. Supp. 592 (D. C. Conn. 1967); *aff'd* 405 F. 2d 50 (2 Cir. 1968); *cert. denied* 394 U. S. 999 (1969) wherein the court of appeals found that "The railroad claimants have produced nothing that would lead to the grant of a special preference for the so-called per diem claims."

The second part of its decision which permitted the Debtor's receivables to remain in the possession of the interline railroads through the set-off process of netting or balancing under the AAR rules also conflicts for the same reasons hereinabove stated, since as this Court decided in *Baker* v. *Gold Seal Liquors,* 417 U. S. 467, 473 (1973), the allowance of a set-off that reduces all or part of an unsecured creditor's claim is a form of priority and should not be allowed as a general rule of administration for Section 77 reorganization courts.[5] Moreover, the Seventh Circuit's opinion in affirming the lower court's finding that it was "powerless" to prevent or affect the pre-reorganization set-off, conflicts with the opinion of this Court in *Thompson* v. *Magnolia Petroleum Company,* 309 U. S. 478 (1940) which decided that a reorganization court may exercise summary jurisdiction to adjudicate controversies relating to the property in its actual or constructive possession. Further, by having intervened in the proceedings and having submitted the controversy over their claims to the reorganization court for determination (A1), the interline railroads had consented to the exercise by that court of its summary jurisdiction to determine the right of set-off. *United States Fidelity & Guaranty Co.* v. *Bray,* 225 U. S. 205 (1911); *Chase National Bank* v. *Lyford,* 147 F. 2d 273 (2 Cir. 1945); Collier on Bankruptcy, Section 23.04, p. 449 and Section 23.08 p. 532 (14th Ed. 1976).

3. The Seventh Circuit's Decision Is in Conflict with a Decision of the Third Circuit.

In holding that payment of pre-reorganization per diem accounts may not be deferred at the discretion of the reorganization court, the Seventh Circuit's opinion is in direct conflict with a decision of the Third Circuit holding otherwise in *In re Penn Central Transportation Company,* 486 F. 2d 519 (3 Cir.

5. See also *Lowden* v. *N. W. National Bank,* 298 U. S. 160 (1935).

1973), *cert. denied* 415 U. S. 990 (1974) (A28, 42-45). The Seventh Circuit, however, while admitting that its decision departed "to some extent" from the Third Circuit's decision, attempted to distinguish its decision by reasoning that the Third Circuit had not addressed itself as had the Seventh Circuit to the difference between per diem and other interline accounts supposedly arising out of the Commission's mandatory settlement orders (A10, 20). The very same observation, however, was made in a petition for a review on writ of certiorari of the Third Circuit's decision which was denied by this Court and which raised the identical matters which the interlines and the Commission successfully argued in the Seventh Circuit.[6]

In all events, the conflict in the two Circuits has now created a confusion as to which decision must be followed as it relates to the priority status of pre-reorganization per diem accounts. A committee of interline railroads has intervened in the Erie Lackawanna Ry. Co. reorganization proceeding which is pending in the District Court for the Northern District of Ohio in the Sixth Circuit and has petitioned for a cost of administration status for the *pre*-reorganization per diem claims of its member railroads, citing the Seventh Circuit decision as authority. The Erie Lackawanna trustee is resisting such allowance based upon the Third Circuit's *Penn Central* holding on the matter. Similarly, the Commission and the interline railroad committee are pressing the Seventh Circuit decision in the courts of the Third Circuit where the estates of several northeast corridor bankrupts are still being administered in Section 77 proceedings.

It is respectfully submitted that only a decision of this Court will resolve this conflict and that such a resolution is necessary for the orderly administration in pending as well as future Section 77 proceedings.

6. *In re Penn Central Transportation Company,* 486 F. 2d 519 (3rd Cir. 1973), *cert.* denied in 415 U. S. 990 (1974) (Cert. No. 73-1201) *Chicago and Northwestern Transportation Co.* et al., *Petitioners* v. *George P. Baker et al. Trustee of Penn Central Transportation Co.,* Respondents.

4. The Seventh Circuit's Decision Deprives the Chicago Rock Island Trustee of Property Without Due Process of Law in Violation of the Fifth Amendment to the Constitution.

The impact of both parts of the Seventh Circuit decision in creating priorities and in requiring an immediate payment of those priorities out of the Trustee's operating revenues to a special class of creditors without giving any consideration to the Debtor's economic needs and without Congressional authority or any equitable basis for such a preference, is to materially reduce the estate of the Debtor Chicago Rock Island Railroad whose property is vested by operation of law in the Trustee under Section 70 of the Bankruptcy Act (11 U. S. C. § 110) and Section 77(c)(2) of said Act (A58).

The effect of this reduction in the estate will be to delay and prejudice the achievement of the basic purpose of Section 77(e) which is to achieve a fair and equitable plan of reorganization "which does not discriminate unfairly in favor of any class of creditors" (A60).

This Court has had numerous occasions to hold that Congress under its bankruptcy power may by legislation suspend a creditor's remedy for the enforcement of his rights against a debtor's assets or affect the measure of his participation therein without offending the due process requirement of the Fifth Amendment, qualified however, by the proviso that the statutory provisions must be consonant with a fair, reasonable and equitable distribution of those assets. *Continental Illinois National Bank & Trust Co.* v. *Chicago R. I. & P. Ry. Co.*, 294 U. S. 648 (1935); *Louisville Bank* v. *Radford*, 295 U. S. 555 (1935); *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445 (1936); *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510 (1940); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1942).

The Seventh Circuit decision, however, has carved out a special priority for railroad creditors contrary to the mandate of Section 77 and contrary to the decisions of this Court. It is

respectfully submitted that such action has denied the Trustee and the estate of the Debtor of substantive due process by immediately and materially reducing the said estate, thereby prejudicing the formulation of a plan of reorganization for the Debtor which is fair and equitable and does not discriminate unfairly in favor of any class of creditors.

The decision of this Court is necessary on the matter of a trustee's constitutional right to due process in the interest of the orderly administration of this and other pending or future reorganizations to be commenced under Section 77. The decision of the Court is also of great importance to the railroad industry and to the public interest if the rehabilitative vehicle of the reorganization statute is to be preserved and not eroded in the fulfillment of its primary objective of preserving the integrity and on-going operations of a railroad pending formulation of a plan. This is especially critical for the Trustee who must preserve his cash at this early stage of the reorganization proceedings and at a time when private financing for railroads inreorganization is very difficult, if not impossible. The maintenance of a national car supply, as successfully urged by the Commission in its reasoning to the Court of Appeals, is a matter of concern for all railroads and the public. Such a need, however, which has not been balanced with the Debtor's needs, cannot serve as the basis for the impermissible taking of the Trustee's property and the Debtor's estate without due process or its impermissible taking without just compensation.

The Trustee invokes the protection of the Fifth Amendment having no other recourse for relief by reason of the denial of substantive due process in the bankruptcy proceedings. The Trustee is compelled by the judgment of the Seventh Circuit to immediately and irretrievably satisfy preferences to a special class of creditors (railroads) without any statutory justification and without any consideration having been given by the court to the Debtor's economic needs. Since the judgment of the Court of Appeals rested exclusively upon the needs of the railroad in-

dustry in diminishing the estate of the Debtor, the Trustee will be deprived of property without due process and without compensation for its public use.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

In the Matter of CHICAGO ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

MEMORANDUM OPINION AND ORDER.

Petitioners, the Atchison, Topeka, and Santa Fe Railway Company and various other railroads, seek modification of this Court's Order No. 1 herein, as amended by Order No. 7; and seek instructions to the Trustee and Debtor pursuant to that order as modified. The Trustee resists this Petition and requests that the Petitioners be ordered to comply with Order No. 1, as modified by Order No. 7, as interpreted by the Trustee.

On March 17, 1975, the Chicago, Rock Island and Pacific Railroad Company filed a petition for reorganization under Section 77 of the Bankruptcy Act, 11 U. S. C., § 205, which petition was granted the same day. The Debtor was authorized, in its discretion, by Order No. 1, to pay all interline balances owed by it to other railroads on interline accounts arising both before and after the commencement of this proceeding. These interline accounts (freight, passenger, per diem, switching, loss and damage, overcharge, trailer rentals, and car repairs) are the accounts which the nation's railroads maintain in order to account for amounts they owe, or are owed, as a result of various mutual services which all the railroads provide for each other on a regular basis.

On April 9, 1975, this Court amended Order No. 1 with respect to the interline accounts. The amendment, Order No. 7, directed the Debtor to pay all balances then existing or thereafter arising for freight charges and divisions and for passenger or ticket charges and divisions. The order further directed the Debtor to pay all balances in the other interline accounts which were due to be stated or presented for settlement on or after May 1, 1975.

Order No. 7 expressly reaffirmed the effectiveness of Order No. 1 as to any matters not modified, which includes the discretionary authority of the Debtor to pay interline accounts or balances stated or presented for settlement prior to May 1, 1975 (pre-bankruptcy accounts) excepting the freight and passenger accounts. Various pre-reorganization interline balances were and are owed by the Debtor to the petitioning railroads. Among these are undisputed balances in the per diem account owed by Debtor to Petitioners. The Petitioners seek, in part one of their Petition, an order of Court requiring the Debtor to pay account balances in favor of the Petitioners in the per diem accounts, regardless of when such balances were due to be stated or presented.

The Per Diem Accounts.

Per diem charges are the charges which each railroad pays for the use of another railroad's cars. Reports of per diem due, the car hire reports, must be forwarded to the owning carrier by the tenth day of the second month following the month in which the per diem accrued. The net balances of these accounts are subject to draft immediately thereafter.

The basic charge to the user of another railroad's cars, known as the car hire rate, is prescribed by the Interstate Commerce Commission for each car and is based on time and mileage factors. *Chicago, B. & O. R. Co.* v. *New York S. & W. P. Co.*, 332 I. C. C. 176. The Commission has also prescribed an incentive element, in addition to basic per diem and mileage,

which is applicable only to unequipped general purpose boxcars. *Incentive Per Diem Charges-1968*, 349 I. C. C. 303 (1975). The Commission's authority to promulgate the above-mentioned rules derives from Section 1(14)(a) of the Interstate Commerce Act, 49 U. S. C. § 1(14)(a), which authorizes the Commission to establish rules and regulations with respect to car service.

Section 77 of the Bankruptcy Act provides that the Trustee shall exercise the power to operate the business of the Debtor "subject to the control of the judge and the jurisdiction of the Commission." 11 U. S. C. § 205(c)(2). The Bankruptcy Act in this respect, as in many other respects, vests coexistent authority in both the Court and the Commission over these reorganization proceedings. Petitioners contend that the Commission's orders with respect to per diem charges require that the railroads, even those involved in § 77 proceedings, settle their interline per diem accounts in the manner and at the times established by the Commission. If, therefore, the Debtor refuses to pay interline per diem balances in favor of Petitioners, which balances arose prior to the reorganization (or the May 1, 1975 date established in Order No. 7), the Debtor's action in so refusing is asserted to be illegal. Therefore, the Petitioners seek a further amendment to Order No. 1 making payment of the pre-organization interline per diem account balances mandatory rather than discretionary.

The Commission's authority to establish the rules and regulations concerning the operation of all aspects of car hire is indisputable. This authority extends to the promulgation of rules which establish the amounts of indebtedness incurred for the use of various cars as well as the manner of settlement and payment on the various interline accounts. This Court is powerless to order the Debtor and Petitioners to disregard the rules of the Commission with respect to the creation of debts arising out of car hire. But this is not to say that this Court may not determine the priorities among those debts created in

accordance with the regulations of the Commission along with those other debts incurred by the Debtor prior to the filing of its Petition in bankruptcy.

The Trustee has not suggested that he be excused from payment of the per diem balances arising prior to March 17, 1975. He merely suggests that it is within the power of this Court, as a Court exercising all of the powers of a bankruptcy tribunal, to leave it to the discretion of the Trustee to pay pre-reorganization debts or to postpone payment pending a determination of priorities among creditors. The trustee's position is not inconsistent with the ruling of the Commission in its above-mentioned order refusing exemption from incentive per diem to bankrupt railroads. *Incentive Per Diem Charges-1968, supra.* That order affirms the existence of the debt. The priority to be given it remains the province of the Court in the bankruptcy proceeding.

The Petitioners also argue that the Court has improperly exercised its discretion in leaving the decision as to whether to pay on the interline accounts to the Trustee, because of the nature of the national railroad system and the function of the interline account system. The Court of Appeals for the Third Circuit dealt with the matter of interline account balances in the Penn Central reorganization. *In re Penn Central Transportation Company,* 486 F. 2d 519 (1973). The District Court in that proceeding had exercised its discretionary authority to prohibit setoffs of various interline account balances in favor of various interline railroads, 340 F. Supp. 857 (E. D. Pa. 1972). The Court of Appeals reversed as to the freight and passenger accounts, holding that those accounts represented funds which were held by the interline railroads in trust for each other. A similar argument to that made in the instant case was made in the Penn Central case with respect to the accounts other than freight and passenger, that is the argument that interline accounts (including per diem) must be paid immediately because "the accounts 'arise directly from specific

statutory requirements and are absolutely essential to the operation of a national rail transportation system.'" 486 F. 2d 528. This argument was rejected by the Third Circuit for reasons with which this Court concurs.

It is the conclusion of this Court, therefore, that it has the jurisdiction and authority to enter the orders it has already entered, and that the Trustee's refusal to pay pre-reorganization per diem balances is within his discretion in accord with existing orders.

The Prohibition Against Offsets.

The remaining issue raised by the Petition is the method to be used in determining the amounts owing to the Debtor on the various interline accounts. The accounting rules published by the Association of American Railroads and subscribed to by all member roads (including the Debtor) require that interline accounts be stated and presented for settlement on a net balance basis and at fixed intervals. These rules have been incorporated into the Commission's rules with regard to the per diem balances, but, as stated above, the Court's power with regard to priorities of debts, even debts created with regard to the per diem accounts, is paramount. Under the rules, information about the relevant events and occurrences during the service month with respect to each account is exchanged among interline carriers, and is then integrated into and reflected by a single net balance for that account. The amount stated by this procedure is the amount of the net interline account balance. "Interline balances" as that phrase is defined by the accounting rules and procedures, refers to the balance in a partcular interline account favorable to a particular interline carrier and subject to draft. Thus, an interline per diem balance would exist in circumstances where the car hire reports, exchanged between railroads on the tenth day of the second month following use of the cars, show that one of the carriers has a balance in its favor. In such circumstances, the rules and

procedures provide that the carrier in whose favor the balance exists shall present a draft for payment of such balance by the debtor carrier.

With respect to the pre-organization interline accounts, the Debtor and Trustee commenced, during April, 1975, to submit drafts to the Petitioners which did not evidence or seek payment of interline account net balances in the Debtor's favor, but were rather for that portion of each such interline account which represented the gross credit in favor of the Debtor. Thus, on April 14, 1975, Debtor presented a draft to the Atchison, Topeka, and Santa Fe for payment of $105,820, allegedly due Debtor in the per diem account between Debtor and Santa Fe. The car hire reports exchanged between Debtor and Santa Fe for the month of January, 1975 reflected entires totaling $105,820 for Debtor and $182,501 for Santa Fe with a balance of $76,681 in favor of Santa Fe. Santa Fe's draft for such net balance was declined on March 25, 1975.

It is the Trustee's postition that the above-described practice which he has initiated is in conformity with the prohibtions against offsets incorporated in Order No. 1 as modified by Order No. 7. The Petitioners contend that offsets within the interline accounts are not prohibited by the orders of this Court, but rather that the accounting rules and procedures of the A. A. R., which are to be followed under the Court's orders, require such offsets in the creation of the actual debts due each of the interline railroads. Therefore, they argue, there is no indebtedness other than that stated after the netting out of the particular interline account. Paragraph 10 of Order No. 1 provides:

> "All persons, firms and corporations holding collateral heretofore pledged by the Debtor as security for its notes or obligations or holding for the account of the Debtor deposit balances or credits or interline balances be and each of them hereby are restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances, or other credits, or any part thereof

> unless authorized by this order, or from offsetting the same, or any thereof, against any obligation of the Debtor, until further order of this Court."

The power of this Court to exercise its discretion in favor of a prohibition against offsets (except in the case of a trust fund account) is well established. *In re Penn Central Transportation Company*, 486 F. 2d 519 (3d Cir. 1973). Therefore, unless the petitioners are correct in their contention that no debt exists except the net balance in a particular account, the trustee should prevail on this issue.

The Court is not in agreement with the petitioners that the debt is created at the point when the account balances are netted. The incident creating an obligation in a particular railroad occurs when a particular service is performed or material used. Therefore, the indebtedness arises at this time. The practice of netting out the balances and presenting drafts for payment some time later is merely a convenient accounting method agreed to by the railroads.

The agreement to settle the interline balances in this manner, however, has created a system of "mutual open accounts" between the Debtor and each of the Petitioners. The concept of a "mutual open account" has been recognized by the Courts. *Brown* v. *Consolidated Fisheries Company*, 165 F. Supp. 421 (D. Del. 1955). The elements necessary to establish such an account are set out at 1 Am. Jur. 2d, *Accounts and Accounting*, § 5:

> "If there are items debited and credited on both sides of an account and not simply a series of transactions resulting always in a debit so far as one of the parties is concerned and a credit insofar as the other party is concerned, the account is called a 'mutual open account'. A mutual account arises where there are mutual dealings, and the account is allowed to run with a view to an ultimate adjustment of the balance. There must be one account on which the items on either side belong and on which they operate to extinguish each other pro tanto, so that the balance on either side is the debt between the parties.

> "It is not enough that the parties should have cross demands, or cross open accounts; there must be a mutual agreement, express or implied, that the claims upon the one side and the other are to be set off against each other. But this is not to say that the items must be of the same nature, so long as the agreement, express or implied, shows that the parties contemplated the reduction of the entire account to one balance to be thus adjusted. The offsetting demands need not accrue simultaneously."

These elements are all present in the various interline accounts under consideration.

Since the debts which arise in the day-to-day operations of the railroads on these "mutual open accounts" extinguish each other, the only debt existing at any particular point in time is the net balance in the account. Normally, the accounts are closed and debts fixed as of the end of each month, but it is conceptually possible to fix the indebtedness as of March 17, 1975, the date of the reorganization Petition. The filing of the Petition closed all accounts for March up to that date. All account balances as of that date are pre-reorganization debts, and it is within the discretion of the Trustee to pay them or to defer payment on net balances unfavorable to the Debtor. All transactions occurring subsequent to that date will give rise to post reorganization interline account balances which the Trustee has been ordered to pay. With regard to the pre-reorganization balances, because of the mutual extinguishment of debts within these accounts, the Court is without power to prohibit the "offsets" which occur as a result of the operation of mutual accounts. Therefore, this Court's order prohibiting offsets does not apply to those occurring within any mutual account while it is still open. The Trustee's presentation of drafts for the gross amounts of credits in its accounts for the pre-organization period is not justified.

Accordingly, Petitioners' motion with respect to Trustee's presentation of drafts for the gross amount of interline balances is granted; Debtor's cross motion for enforcement of Orders No. 1

and 7 is denied. Petitioners' motion with respect to payment of pre-reorganization per diem balances is denied. The parties are invited to submit an order modifying Order No. 1 in accordance with this opinion.

ENTER:

/s/ FRANK J. MCGARR,
United States District Judge.

Dated: June 23, 1975

IN THE UNITED STATES COURT OF APPEALS,
for the Seventh Circuit.

Nos. 75-1738, 75-1739, 75-1740 and 75-1741
In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Debtor-Cross-Appellee,

WILLIAM GIBBONS,
Trustee-Appellant, Cross-Appellee,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Intervenors-Appellees,
Cross-Appellants,

INTERSTATE COMMERCE COMMISSION,
Cross-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 75 B 2697

FRANK J. MCGARR, *Judge.*

Argued January 15, 1976—Decided July 1, 1976

Before HASTINGS, *Senior Circuit Judge,* SWYGERT, *Circuit Judge,* and EAST, *Senior District Judge.**

HASTINGS, *Senior Circuit Judge.* The Chicago, Rock Island and Pacific Railroad Company filed a petition for reorganization under Section 77 of the Bankruptcy Act, 11 U. S. C. § 205, on

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.

March 17, 1975. William Gibbons was appointed trustee by the reorganization court, and his appointment was approved by the Interstate Commerce Commission. The Atchison, Topeka and Santa Fe Railway Company, and 22 other interline railroads, were granted leave to intervene in the reorganization proceedings.

Section 77 proceedings contemplate the continued operation of the bankrupt railroad by the trustee pending adoption by the Interstate Commerce Commission of a reorganization plan generally acceptable to shareholders, creditors and the court. Railroad operations during the reorganization period remain subject both to the supervision of the reorganization court and to the jurisdiction of the Commission. At issue in this appeal are certain orders of the court governing the Rock Island's operation during this reorganization period prior to the adoption of the reorganization plan.

The orders here in issue concern the trustee's payment and collection of various interline accounts maintained between the Rock Island and the intervening railroads. Interline accounts are kept by the nation's railroads in order to allocate the costs and revenues from certain joint operations and to account for amounts owed as a result of various mutual services which all railroads must provide for each other on a regular basis. All railroads keep accounts which cover through service in passengers and freight, switching, loss and damage, overcharge, trailer rentals, car repair, and per diem.

The interline railroads and the Interstate Commerce Commission appeal from the ruling of the reorganization court governing the trustee's payment of the per diem interline account. The trustee appeals from the ruling of the reorganization court governing the trustee's collection of interline accounts generally. We consider each ruling, and the facts relevant thereto, *seriatim.*

I.

We first consider the reorganization court's ruling that it had the power to permit the trustee, within his discretion, to defer

payment of amounts owed by the Rock Island on pre-reorganization per diem accounts. The interline railroads and the Commission appeal from that decision. We reverse.

The per diem account represents charges which each railroad must pay for the use of another railroad's cars. The Commission has statutory authority to comprehensively regulate all aspects of car service to assure both adequate supply and efficient allocation of the national pool of rail cars.[1] Under that authority, it has set mandatory per diem rates and has adopted mandatory rules governing the settlement of per diem accounts. Per diem charges include a "basic per diem" rate paid by the car-user to the car-owner to compensate the car-owning railroad for the average cost of purchasing and maintaining its cars.[2] The Commission has also adopted an "incentive per diem" charge which operates to encourage the prompt return of equipment found to be in short supply.[3]

Since 1930, the Commission has adopted and made mandatory the rules of the Association of American Railroads (AAR) governing the settlement of per diem accounts.[4] These per diem rules provide for each railroad to supply a monthly statement within forty days of the end of each calendar month, setting out the number of days each car has been in its possession during that month. This statement is forwarded to the car-owning road, which may make an immediate draft for any amount in its favor after subtracting the amount which it, in turn, owes the other carrier for use of its cars.

In the instant reorganization proceedings, the trustee's payment of interline accounts, including per diem accounts, is governed by the court's Order No. 1 as substantially modified

1. Interstate Commerce Act, 49 U. S. C. §§ 1(10)-(17).

2. *Chicago, B. & Q. R. R.* v. *New York, S. & W. R. R.*, 332 I. C. C. 176 (1968).

3. *Incentive Per Diem Charges-1968*, 337 I. C. C. 183, 217 (1970).

4. *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 165 I. C. C. 495 (1930).

by its Order No. 7. Order No. 1, entered on March 17, 1975, authorized the trustees to pay all interline accounts, but did not require him to do so. That provision was amended by Order No. 7, entered on April 9, 1975. The amended order required the trustee to pay all interline freight and passenger accounts. It further required payment of interline accounts, other than passenger and freight, presented for payment or due to be stated under AAR rules *after* May 1, 1975. With respect to per diem, these "post-reorganization" accounts represented the Rock Island's car use after the filing of its reorganization petition. Those interline accounts, other than passenger and freight, presented for payment or due to be stated *before* May 1, 1975, could be paid or deferred at the discretion of the trustee. These "pre-organization" per diem accounts are accounts presented for payment during the reorganization period for car use before the reorganization petition was filed.

Pursuant to these orders, all post-reorganization interline accounts have been paid regularly under normal procedures, as have passenger and freight accounts for both the post-reorganization and pre-reorganization periods. The trustee, however, has declined to pay at this time the other pre-reorganization interline accounts, including the per diem account, for the months of January, February and March 1975. Payment of these accounts is within the trustee's discretion under the applicable court orders. The interline railroads have acquiesced in the deferred payment of all pre-reorganization interline accounts *except* the per diem account.

On April 25, 1975, the interlines petitioned the reorganization court to modify its Orders Nos. 1 and 7 to require mandatory payment by the trustee of all pre-reorganization per diem accounts. This petition was supported by a memorandum of the Interstate Commerce Commission. The interline railroads and the Commission contended that ICC regulations governing the amount, manner and timing of settlement of per diem accounts could not be overruled or modified by the reorganiza-

tion court. The court rejected this argument and denied the interlines' petition. Memorandum Opinion and Order, June 23, 1975 (Unreported). The court concluded that, although ICC regulations conclusively establish the existence of the pre-reorganization per diem debt, the court, under its general powers in a bankruptcy proceeding, could establish the priority of that debt in relation to other debts incurred by the Rock Island prior to filing its reorganization petition. The court thus declined to modify its order leaving to the trustee's discretion whether to pay pre-reorganization per diem accounts or to postpone payment pending a determination of priority among creditors.

The appeal of the interline railroads and of the Commission from that decision presents a conflict between the statutory authority of the reorganization court and that of the Commission over the affairs of a railroad in Section 77 reorganization.

The trustee, in support of the decision of the reorganization court, relies on those provisions in Section 77 which establish the authority of the reorganization court over the determination of rights and liabilities of creditors. Section 77(a) confers on the court exclusive jurisdiction over the debtor railroad and its property and grants the court all powers over that property traditionally exercised by an equity receiver. Section 77(l) grants the court the jurisdiction and power of an ordinary bankruptcy court to the extent that grant is not inconsistent with the provisions of Section 77. Section 77(b) makes expressly applicable Section 60 powers to avoid preferential transfers. Section 77(c)(7) provides for the court to determine provable and allowable claims and classes of creditors and shareholders.

The broad power of the reorganization court in matters affecting the claims of creditors is essentially undisputed. In *In re Chicago & North Western Railway Co.*, 7 Cir., 121 F. 2d 791 (1941), we resolved a conflict between the authority of the Commission and that of the reorganization court, stating:

> To equitably adjust debts of the debtor, provide priorities to creditors, make provision for [the railroad's] future successful operation—these are the objects sought by the debtor railroad when it comes into court under Sec. 77 of the Bankruptcy Act. * * * [I]n order to carry this out the debtor must apply to the court which has not a divided, but an exclusive jurisdiction over it and its property.

Id. at 797. The trustee contends that the pre-reorganization per diem accounts merely represent a debt which the Rock Island owed to creditor railroads at the time it filed its petition and that control over payment of the debt is within the authority which the reorganization court exercises over the estate of the debtor and the pre-reorganization claims of creditors.

The interline railroads and the Commission, however, contend that payment of per diem accounts is controlled, not by provisions governing claims of creditors, but rather by provisions governing the operation of the railroad in reorganization. They rely on Section 77(c)(2) which provides that during the reorganization period the trustee has the power to operate the business of the debtor railroad "subject to the control of the judge *and the jurisdiction of the Commission.*" (Emphasis added.) 11 U. S. C. § 205(c)(2). This provision recognizes that a railroad operating in reorganization remains subject to applicable Commission orders.[5] A reorganization court is without power to exempt a railroad in reorganization from compliance with those orders. *In re Lehigh Valley Railroad Co.*, 3 Cir., 508 F. 2d 332, 338 (1975). *See also Palmer* v.

5. See also Interstate Commerce Act, 49 U. S. C. § 1(17)(a), which provides with respect to ICC regulation of car service: "[I]n case of failure or refusal on the part of any carrier, *receiver*, or *operating trustee* to comply with any such order or direction such carrier, *receiver*, or *trustee*, shall be liable to a penalty of not less than $100 nor more than $500 for each such offense. . . ." (Emphasis added.)

6. Justice Frankfurter, writing for the Court in *Palmer*, considered the Commission's role in these proceedings to be a safeguard of the public interest. He wrote:

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Massachusetts, 308 U. S. 79, 86-7 (1939);[6] *New Haven Inclusion Cases,* 399 U. S. 392, 431 (1970).

It is apparent that the competing statutory provisions relied on by the parties merely represent the multiple, and at times conflicting, purposes which Section 77 is designed to achieve. The trustee's position and the statutory authority which he cites promotes two traditional bankruptcy goals: rehabilitation of the debtor and equitable distribution of available assets to creditors. The Commission, on the other hand, relies on statutory provisions indicating Congressional intent to harmonize Section 77 proceedings with the comprehensive regulation of national rail transportation which the Commission administers.[7] Thus the trustee argues that immediate payment of pre-reorganization per diem accounts will severely burden the Rock Island's already distressed financial condition and unfairly benefit the interline railroads at the expense of the Rock Island's other creditors. The Commission argues that deferred payment of per diem accounts will undermine a finely balanced regulatory scheme, force other railroads (some of which are themselves financially troubled) to subsidize Rock Island's operations, and exacerbate an already severe national rail car shortage.

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> [T]he long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

308 U. S. at 86-7.

7. *See* COLLIER ON BANKRUPTCY ¶ 77.02, at 469, 471 (14th ed. 1976).

We are not persuaded that any language in the statute itself clearly indicates which policy and which authority is to predominate in the situation before us. It is our conclusion, however, that in view of the comprehensive regulation by the Commission of all aspects of car service and the key role which rules for settlement of per diem accounts play in that regulatory system, the payment of per diem accounts for both post- and pre-reorganization periods is properly considered as part of the operation of the railroad in reorganization under Section 77 (c)(2) and is consequently governed by Commission orders.

We recognize that the pre-reorganization per diem accounts do represent a claim against the debtor's estate and in that sense constitute a "debt" within the meaning of the Bankruptcy Act.[8] However, several factors persuade us that the reorganization court's power in determining the priority of that claim in relation to claims of other creditors has been circumscribed by the superseding authority of the Commission in this area.

The Commission has argued before our court that the relationship between interlines with respect to car hire is more that of copartners than of debtor and creditor. In its decisions the Commission has treated per diem accounts as a statutorily-required sharing of the costs of maintaining an adequate national car pool. *Chicago, Burlington & Quincy Railroad Co.* v. *New York, Susquehanna & Western Railroad Co.,* 332 I. C. C. 176 (1968). *See United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U. S. 742, 743 (1972). Basic per diem rates provide no profit to the car-owning road and are assessed even when the user derives no benefit from its use of the car. *Chicago B. & Q. R. R.,* 332 I. C. C. at 186. In its decision getting basic per diem rates, the Commission stated:

> There is sound reason why these per diem charges should constitute no more than a sharing of cost. We are not concerned with the problem of calculating proper charges to customers of the respondents, but with the assignment

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8. *Cf.* 11 U. S. C. § 1(14).

> among a group of carriers engaged in multitudinous joint ventures, of the burden of acquiring and maintaining the vehicles used by all. Not only is their use compulsory on the paying line but a great deal of the use which is made and for which charges are paid is not productive of revenue to the user.

Id. at 187-8. The goal of equitable cost-sharing of a common pool of rail cars can be achieved only through uniform observance of per diem charges. *Id.* at 258; *Incentive Per Diem Charges*, 349 I. C. C. 303 (1975); *see also Chicago, Rock Island & Pacific Railway Co.* v. *United States*, 284 U. S. 80, 100 (1931).

Moreover, the Commission has found it necessary not only to prescribe per diem rates for car hire but also to prescribe precise rules for the settlement of per diem accounts. The per diem account differs in this respect from the other interline accounts for which the trustee has deferred payment in these proceedings. No mandatory Commission orders regulate the settlement of those accounts. However, with respect to the per diem account, the Commission's adoption of the AAR per diem rules expressly requires payment of per diem accounts to be made at the time and in the manner prescribed by those rules. Based on our reading of applicable Commission orders, we cannot adopt the reorganization court's view that the Commission's per diem orders merely govern the creation of the per diem debt.

In view of the mandatory nature of Commission orders governing the settlement of per diem accounts, we conclude that the trustee must pay these accounts as they become due in accordance with the per diem rules. We do not accept the reorganization court's distinction with respect to the per diem accounts between those accounts which represent pre-reorganization car use and those which represent post-reorganization car use. Since Commission orders prescribe the *time* and *manner* of payment, the trustee is in *current* violation of Commission orders governing all operating railroads when he

refuses to pay per diem accounts which become due during the reorganization period. Section 77(c)(2) requires the trustee in operation of the railroad prior to adoption of the reorganization plan to comply with all orders of the Commission. It is clear to us that this provision requires compliance with Commission orders setting mandatory rules for the settlement of per diem accounts.

We have considered the Commission's contention that a contrary result would substantially disrupt the Commission's regulation of car service, especially if the number of major railroads in reorganization continues to increase. The Commission has called our attention to the existence of a severe national car shortage[9] and the importance of uniform application of per diem rules in the Commission's attempted solution to that problem. As the Commission points out, by avoiding payment of pre-reorganization per diem accounts under the Commission's uniform accounting rules, railroads in reorganization could undermine attempts to increase supply and improve allocation of the national rail car fleet. Other railroads, many of which are themselves financially troubled, would be forced in effect to subsidize the bankrupt lines for their pre-reorganization car use. Since basic per diem rates cover only an average cost of car ownership, nonpayment by bankrupt roads would result in a failure to compensate car-owning roads for the full costs of car ownership. This would tend to discourage rather than encourage car ownership and would consequently thwart recent Congressionally mandated attempts to increase car supply.[10] It appears to us that Section 77, by providing

9. The problem of a national car shortage has been acknowledged in decisions of the Supreme Court. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742 (1972); *United States* v. *Florida East Coast Ry.*, 410 U. S. 224, 230 (1973). *See generally Note: The Freight Car Shortage and ICC Regulation*, 85 HARV. L. REV. 1583 (1972).

10. Congress in 1966 sought to deal with the problem by amending the Interstate Commerce Act, 49 U. S. C. § 1(14)(a) to broaden the Commission's authority over car service. That amendment

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for Commission involvement in every aspect of reorganization proceedings and by preserving Commission authority over the operation of the bankrupt railroad, is designed to effect reorganization without undermining or disrupting administrative regulation of the national rail system.

Our conclusion in this case departs to some extent from the holding of the Third Circuit in *In re Penn Central Transportation Co.*, 3 Cir., 486 F. 2d 519 (1973), *cert. denied*, 415 U. S. 990 (1974). However, a reading of the court's decision in that case indicates that the argument urged before our court was not similarly presented in those proceedings. The court held in *Penn Central* that under traditional trust principles, payment of amounts showing in pre-reorganization interline passenger and freight accounts collected by Penn Central on behalf of the interline railroads could not be deferred by the trustee. However, deferred payment of other pre-reorganization interline accounts, including per diem, was held to be permissible at the discretion of the reorganization court. It appears that no attempt was made in those proceedings to distinguish the per diem account from other interline accounts. The court relied in part on its finding with respect to all interline accounts, other than passenger and freight, that "[d]espite the legal obligation to perform the services, there is no compulsion, statutory or otherwise, as to the manner by which the services shall be paid. Arrangements for payment or credit are voluntary." *Id.* at 528. In fact, as we have emphasized in our decision, the Commission has set *mandatory* rules for settlement of per diem accounts.

Nor do we find the reasoning in that case controlling in resolving the question here before us. The result in *Penn Central* was reached by an application of trust principles. It is conceded

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requires the Commission in the regulation of car service to consider "factors affecting the adequacy of the national freight car supply" and authorizes the Commission to introduce an incentive element in per diem rates. *See* 1966 U. S. CODE, CONG. ADMIN. NEWS, at 2227-30.

in this case that trust principles do not require immediate payment of the pre-reorganization per diem accounts. While the existence of a trust relationship may require payment of passenger and freight accounts, as the court found in *Penn Central*, it is not conversely true that, in the absence of a trust relationship, payment of per diem accounts is *not* required.[11] We view the question before us as essentially a question of statutory construction and have resolved it upon a consideration of the applicable provisions of Section 77 and the policies they represent. We do not believe that our reasoning or the result we have reached is in conflict with the decision of the Third Circuit.

We conclude that the reorganization court erred in its order permitting the trustee to defer payment of pre-reorganization per diem accounts. We therefore reverse the decision of the reorganization court denying the interlines' petition to modify its orders governing the trustee's payment of per diem accounts.

II.

We next consider the ruling of the reorganization court limiting the trustee in the collection of pre-reorganization interline accounts to the outstanding net balance, if any, in the Rock Island's favor. The trustee appeals from that ruling. We affirm.

We are concerned here with the settlement of pre-reorganization accounts between the Rock Island and the interline railroads covering switching, loss and damage, overcharge, trailer rentals, and car repair.[12] Settlement of these accounts is ordi-

11. We note that Judge Adams, concurring in the *Penn Central* decision, cautioned against drawing negative inferences from the court's trust rationale. 486 F. 2d at 532-3. He further suggested that decisions concerning payment of interline accounts under Section 77 be based on a consideration of "pragmatic factors" and "Congressional pronouncements." *Id.* at 531.

12. Under the court's Order No. 1 as modified by Order No. 7, the settlement of all passenger and freight accounts is not affected by the reorganization proceedings, nor is the settlement of those accounts covering the Rock Island's post-reorganization operation.

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narily made pursuant to rules promulgated by the Association of American Railroads, which are binding on all members of that association, including all railroads involved in these proceedings.[13] Under the AAR Accounting Rules, information about the various transactions and services for which interline accounts are kept is exchanged for each account on a monthly basis. The carrier with a net balance in its favor in any account upon exchange of reports may thereafter present the other carrier with a draft for that amount. AAR rules provide for monthly settlement on a net balance basis for all the interline accounts with which we are here concerned.

Under the discretion conferred by applicable orders of the reorganization court, the trustee declined to honor at this time drafts presented by the interline railroads for net balances owed by the Rock Island on the relevant pre-reorganization interline accounts. The trustee, at the same time, was authorized and directed by court order "to collect all outstanding interline and other accounts owing to the Debtor." (Order No. 1, March 17, 1975.) In reliance on this authority, the trustee submitted drafts to the interline railroads not for the net balances for which settlement is ordinarily made under AAR rules but rather for the gross credits in the Rock Island's favor in each of the pre-reorganization interline accounts here in issue.

The interline railroads refused to pay this gross amount, claiming that pursuant to AAR Accounting Rules the trustee was entitled to collect only any net balance which might exist in favor of the Rock Island in an individual interline account.

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(See discussion at 3-4, *supra.*) Under the holding of this court as set out in Part I of this opinion, the per diem accounts for both pre- and post-reorganization periods are also to be settled at the time and in the manner prescribed by AAR rules as adopted by the Commission.

13. The accounting procedures followed by the interline railroads in the settlement of interline accounts are set out in the affidavit of J. M. Johnson, submitted to the reorganization court in support of the interlines' April 25, 1975, petition to modify the court's orders.

The court's Order No. 7 expressly required compliance during the reorganization proceedings with all existing rules and procedures of the AAR. The trustee, however, maintained that the drafts for gross credits were proper under governing court orders and that any netting of interline balances prior to collection by the trustee would violate the general order of the reorganization court which prohibited offsets by creditors.[14]

The interline railroads petitioned the reorganization court on April 25, 1975, to instruct the trustee in the collection of the pre-reorganization accounts for which payment by the trustee was properly deferred to present drafts only for the favorable net balance, if any, showing in each account, and not for the gross credits in the Rock Island's favor. The trustee cross-petitioned for enforcement of the court's order prohibiting the offset of interline accounts as he interpreted it. In its Memorandum Opinion and Order of June 23, 1975, the court granted the interlines' petition and denied the cross-petition of the trustee. The trustee was thus prohibited from presenting drafts for the gross credits in favor of the Rock Island on pre-reorganization interline accounts. On July 23, 1975, the court entered Order No. 19, supplementing its earlier prohibition against offsets by expressly excluding the netting of interline accounts from that prohibition.

In determining the application of its prohibition against offsets to the trustee's collection of pre-reorganization interline accounts, the court concluded that the AAR Accounting Rules governing the settlement of interline accounts establish "mutual open

14. The court's Order No. 1 as modified by Order No. 7 provided in relevant part:

> [I]t is ORDERED [that] * * *
>
> 10. All persons, firms and corporations * * * holding for the account of the Debtor, deposit balances or credits or interline balances be and each of them hereby are restrained and enjoined * * * from offsetting the same, or any thereof, against any obligation of the Debtor, until further order of this Court. The restraint against offset against any obligation of the Debtor * * * shall be effective * * * notwithstanding any provisions to the contrary contained in the Railway Accounting Rules published by the Association of American Railroads.

accounts." The court cited the following definition of a mutual open account:

> If there are items debited and credited on both sides of an account and not simply a series of transactions resulting always in a debit so far as one of the parties is concerned and a credit insofar as the other party is concerned, the account is called a 'mutual open account'. A mutual account arises where there are mutual dealings, and the account is allowed to run with a view to an ultimate adjustment of the balance. There must be one account on which the items on either side belong and on which they operate to extinguish each other pro tanto, so that *the balance on either side is the debt between the parties.* It is not enough that the parties should have cross demands, or cross open accounts; there must be a mutual agreement, express or implied, that the claims upon the one side and the other side are to be set off against each other. * * * (Emphasis added.)

1 AM. JUR. 2d, *Accounts and Accounting* § 5, at 374-5 (1962). It is clear from this definition, and the trustee does not seriously dispute, that under the agreement of the railroads to the AAR Accounting Rules, the interline accounts are properly characterized as mutual open accounts. According to that definition, one feature of a mutual open account is that day-to-day debits and credits are mutually extinguished automatically so that at any point in time the debt owed on the account consists only of the outstanding net balance.[15] Based on the character of the interline accounts as mutual open accounts, the reorganization court concluded that it was without power to prohibit those daily "offsets" which occur automatically within each account and that the trustee consequently was limited to collection of only the net balances which might exist in the Rock Island's favor.

15. The interlines have cited numerous cases which set out the characteristics of a mutual open account. *See, e.g., In re Vicen's Estate*, 1 Wis. 2d 193, 83 N. W. 2d 664, 667 (1957), where the court held that a mutual open account is "kept open and subject to a *shifting balance* as additional related entries of debits and credits are made thereto, until it shall suit the convenience of either party to settle and close the account." (Emphasis added.)

The trustee challenges the decision of the reorganization court on two grounds. He first contends that the offsets within pre-reorganization interline accounts actually occurred when the accounts were presented for settlement after the filing of the reorganization petition and that they were consequently in direct violation of the court's order entered on the day the petition was filed prohibiting post-petition offsets. This contention is based on the trustee's mistaken belief that the netting of interline accounts occurs only when information is exchanged for monthly settlement. In fact, as described by the reorganization court, the key characteristic of the interline accounts as mutual open accounts is that there is no debt at any point of time between interline railroads other than the net balance in the account. That the parties choose to close the account for periodic settlement does not mean that the account is netted only when it is settled. (See n. 15.) In fact, the account is *always* conceptually represented by a net balance; the date of settlement merely sets the time at which the existing net balance is subject to draft and payment.

Even accepting the view that the offsets within interline accounts occurred before the reorganization petition was filed, the trustee further contends that the court took an improperly limited view of its own authority to undo pre-reorganization transactions. However, our reading of the reorganization court's opinion indicates that its decision was not based on any restricted view of its own powers but rather on the nature of the interline accounts themselves. The court found itself to be without power to prohibit pre-reorganization "offsets" within interline accounts only in the sense that, by definition, the sole debt which exists in a mutual open account at any point of time is the net balance. There is, in effect, *no* debt for the gross credits on either side. Because of this feature of the interline accounts, the reorganization court concluded, and we agree, that the trustee's attempt to present drafts for the gross credits in favor of the Rock Island on pre-reorganization interline accounts was improper.[16]

16. We also note the interline's contention, which the trustee does not dispute, that in all other reorganization proceedings, interline accounts have been settled on a net balance basis.

It is our conclusion that the decision of the reorganization court which limits the trustee in the collection of pre-reorganization interline accounts covering switching, loss and damage, overcharge, trailer rentals, and car repair, to the favorable net balances in those accounts is affirmed. For the reasons set out in part I of this opinion, however, we reverse the decision of the reorganization court to the extent it permits the trustee to defer payment of pre-reorganization per diem accounts. The cause is remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART.
REVERSED IN PART.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

August 3, 1976.

Before

HON. JOHN S. HASTINGS, *Sr. Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WILLIAM G. EAST, *Sr. District Judge**

In the Matter of:

CHICAGO ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Debtor-Cross-Appellee,

WILLIAM GIBBONS,
Trustee-Appellant,
Cross-Appellee,

No. 75-1738, 1739, 1740 and 1741

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Intervenors-Appellees,
Cross-Appellants,

INTERSTATE COMMERCE COMMISSION,
Cross-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(75 B 2697)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, Denied.

* Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES COURT OF APPEALS,
Third Circuit.

In the Matter of
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor.
Appeal of INDIANA HARBOR BELT RAILROAD COMPANY, in

No. 72-1436.

Appeal of MEMBERS OF THE COMMITTEE OF INTERLINE RAILROADS et al., in No. 72-1437.

Appeal of LOUISVILLE AND NASHVILLE RAILROAD COMPANY, in

No. 72-1438.

Nos. 72-1436 to 72-1438.

Decided Oct. 9, 1973.
Argued April 26, 1973
Before VAN DUSEN, ALDISERT and ROSENN, *Circuit Judges.*
Reargued Before the Court En Banc
May 23, 1973
Before VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and WEIS, *Circuit Judges.*

OPINION OF THE COURT.

ROSENN, *Circuit Judge.*

The primary issues raised on this appeal are (1) whether freight and passenger revenues earned by railroad carriers for

interline transportation or services but collected by Penn Central Transportation Company (Penn Central) in their behalf are held by it as trust funds, and (2) whether other interline services performed and expenses incurred by the interline carriers for Penn Central prior to its reorganization, are entitled to current payment or offset. The district court in the Penn Central reorganization held that the interline railroads[1] (Interlines) were not entitled to current payment of their claims from the debtor or to a declaration of an equitable lien or priority. In addition, the court enjoined them from setting off these amounts against corresponding claims of Penn Central. In reviewing this order we are compelled to examine the complex accounting procedures of our national railroad systems and apply traditional principles of equity and trust law to the operating relationships among the railroads. We affirm in part and reverse in part.

I. THE BACKGROUND.

The district court has succinctly described the system of accounts of interline railroads in its Opinion and Order No. 613, 340 F. Supp. 857 (E. D. Pa. 1972) as follows:

> The nation's railroads function in many ways as a single system. For example, a shipper or receiver pays one railroad for services of carriage for the entire shipment, although the shipment may travel over many different railroads; a railroad car may travel over the lines of many different railroads, and be used by each of them, before it again returns to the possession of the owning railroad; and

---

1. An "interline railroad" is a railroad common carrier which cooperates with other railroads in the tranportation of passengers or property over their lines, as required of all railroads engaging in interstate commerce by the Interstate Commerce Act, 49 U. S. C. § 1(4). The act provides in relevant part:

> It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; . . . .

See, e.g., Southern Ry. Co. v. Flournoy, 301 F. 2d 847, 854 (4th Cir. 1962).

> a shipper whose freight may have been damaged in shipment by one of several carriers may apply to any of them for payment of his claim. The railroads have created a system of accounting and periodic settlement of accounts to facilitate this manner of operation. The accounting for various types of rail service rendered to the public or to other railroads results in "interline accounts," and the striking of balances between the railroads with respect to these interline accounts results in "interline balances." Each of the accounts is settled separately; there is no netting of the balances in different accounts.[1]

1. This system of accounts is established and governed by rules promulgated by the Association of American Railroads ("AAR"), of which the railroads in this proceeding are members. . . .

The methods of accounting and payment for interline services, however, are not controlled by statute but by industry accounting practices and rules.

The two basic categories of accounts here in issue are: (1) freight and passenger accounts; (2) other accounts, including (a) car repair accounts, (b) overcharge and loss and damage accounts, (c) per diem accounts, and (d) switching accounts. The accounting rules, described below in greater detail, differ for each of the categories. Basically, as to the first category, either the destination or the originating carrier collects the sums earned by each of the interline railroads and then allocates the appropriate amounts. As to the other accounts, the railroad that performs the service collects the amounts due it from the appropriate carrier.

Penn Central filed its petition for reorganization under section 77 of the Bankruptcy Act on June 21, 1970. In Order No. 1, approving the petition, entered on the same day, the court in paragraph 3(B) authorized Penn Central "in its discretion" to pay all interline accounts.[2]

2. The order stated that Penn Central was authorized to pay all interline accounts and balances owing by Debtor, including

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On June 24, 1970, one of the interline carriers, Burlington Northern, Inc., petitioned the district court to require Penn Central to pay interline accounts and balances.[3] At a hearing on July 1, 1970, Charles S. Hill, Penn Central's Vice-President-Comptroller, explained that Penn Central incurs an average net liability for interline charges of $24 million per month, owing $41 million and earning $17 million. On accounts stated in June 1970 which remain unpaid and are here in issue, he said it owed approximately $32.8 million, representing services performed in April and May 1970, and earlier.

Mr. Hill also endeavored to explain Penn Central's plans as they related to interline accounts. He described Penn Central's cash forecast for the month af July and, when asked whether interline balances had been provided for, replied:

> We have made provisions on the expectation with the approval of the Court for meeting all of the interline accounts to be presented after or scheduled to be presented after June 30.

He explained that these payments would reflect services performed in June 1970 and earlier and that payment on them would begin July 23.

(Continued from preceding page)

> amounts in respect of revenues from freight, passenger or other traffic interchanged with other carriers, and charges for repairs of, or loss damage to, rolling stock and equipment interchanged with other carriers, all claims for injuries, death or other loss or damage to passengers and others arising from the operation of its railroad and properties, and all claims for loss, damage or delay to freight and baggage and all claims for overcharges and for reparation, and all accounts for services, materials and supplies rendered or furnished to the Debtor, whether chargeable in the first instance to expenses, or otherwise.

3. The "interline carriers" involved in this appeal are the 39 railroad systems set forth in the caption of this opinion. All appellants except the Indiana Harbor Belt Railway Company and the Louisville and Nashville Railroad Company intervened in the proceeding below as the Committee of Interline Railroads. The Committee includes 40 additional railroads not here involved.

At the conclusion of the hearing, the court invited the parties to submit an order making mandatory the payment of charges stated "from and after" July 1, 1970. Order No. 9, drafted by the parties, was entered the same day. It ordered payment of all interline accounts first stated or presented on or after July 1, 1970.[4] It also specifies that it does not prejudice the right of the Interlines to claim priority for interline accounts stated prior to July 1.

A controversy subsequently arose when the Interlines attempted to set off the interline balances they owed Penn Central against amounts owed them by Penn Central. Consequently, on June 24, 1971, the trustees petitioned the court to order that the Interlines pay all balances due. The trustees alleged that the Interlines had failed to honor drafts drawn by Penn Central in total amount of $413 million representing pre-bankruptcy interline balances such as claims for May 1970 freight services.[5] They contended that this violated Order No. 1, paragraph 10, providing:

> All persons, firms and corporations . . . holding for the account of the Debtor deposit balances or credits be and each of them hereby are restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits or any part thereof, or from offsetting the same, or any thereof, against any obligation of the debtor, until further order of this court.

4. The relevant portion of Order No. 9 states:

> And Now, to wit: this First day of July, 1970, it is Hereby Ordered that paragraph 3 of the Order of June 21, 1970, is hereby Amended so as to direct and require the Debtor (in lieu of authorizing the Debtor in its discretion) to pay to other railroads freight charges and divisions, passenger or ticket charges and divisions, per diem, mileage, and per diem claims, car repairs, trailer rentals *and all other interline accounts and balances first stated or presented and due to be stated or presented for settlement on or after the date of this Order* in accordance with the now existing rules and procedures of the Association of American Railroads and otherwise in accordance with the rail carriers' ordinary business practice. [Emphasis supplied.]

5. The parties have indicated that these amounts are primarily May 1970 freight and passenger balances.

The Interlines defended and counterclaimed, alleging that they were entitled to offset amounts they owed Penn Central against amounts Penn Central owed them. They also alleged that Penn Central held in trust for them (a) amounts collected in their behalf for interline freight and passenger services and (b) amounts they paid on Penn Central's behalf for overcharge and loss and damage claims. In addition, they argued that Penn Central's assets should be impressed with an equitable lien for such amounts. In counterclaiming, they further alleged that Order No. 9 required Penn Central to pay immediately unpaid interline balances which would become subject to draft in July and represented pre-June 20 car repairs, passenger receipts, and services and supplies.

The district court ruled in favor of the trustees and entered Order No. 613 enjoining any further setoffs. The Interlines appeal that order. They argue (1) that Penn Central holds in trust balances arising from freight and passenger services rendered by the Interlines; (2) that other interline accounts must be paid because the Interlines are compelled by law to perform these services; and (3) that Order No. 9 requires the payment of May 1970 car repair charges and passenger balances which become subject to draft in July.

II. Freight and Passenger Accounts.

Freight and passenger charges are collected by the originating or destination carrier for services performed by the Interlines. Under the AAR rules, instead of separately paying each carrier that participates in an interline shipment, the shipper pays all freight charges to either the originating carrier when the shipment is "prepaid" or to the destination carrier on "collect" shipments. Funds collected are deposited in the collecting carriers' general accounts. The interline railroads make numerous collections for each other daily which are segregated and settled monthly. No interest is paid by the collecting carrier for the period it holds another carrier's revenue.

The destination railroad is responsible for preparing and settling interline freight accounts. It prepares an "abstract" on which the appropriate freight charges are allocated to the participating carriers. It then "not later than the eighteenth of the succeeding month" sends copies of the abstract to the other carriers.[6] The carriers may then *immediately* draw a draft on the destination railroad for the *net balance* due for the month. The destination carrier must include in the monthly accounting all charges for which the destination carrier has received a waybill, whether or not the shipper paid. The waybill is issued by the originating carrier and prescribes the movement of the shipment and charges. The charges which Penn Central has not paid in the instant case represent May 1970 freight services; Penn Central declined drafts submitted on or after June 22, 1970, of approximately $15 million for these accounts.

Passenger accounts are handled similarly. The monthly reports, however, are not required until the last day of the first month following the service. Net passenger balances also are subject to immediate draft upon receipt of the statements. Penn Central has declined drafts submitted on or after July 1, 1970, for approximately $280,000 for May traffic.

The AAR interline accounting system is in essence, therefore, a system by which one railroad collects monies owed by shippers to both itself and other railroads. The monies collected belong only in part to the collecting railroad; as to monies owed other railroads, the collecting railroad serves merely as a receiving and transmitting agent. A common sense interpretation of this system would indicate that funds collected by one railroad for and in behalf of another railroad are held in trust by the collecting railroad until the monies are transmitted. Whether the money is held in trust must be determined, however, not merely

6. If the settling carrier is unable to forward the interline freight summary in time to reach the other carriers by the twentieth of the month, upon request it must notify the carriers by prepaid telegram. Thus, freight balances are subject to draft, at the latest, on the twentieth.

by reliance on common sense, but also by application of traditional legal doctrines. We therefore turn to the law of trusts to make that determination. In applying the law of trusts, it will be necessary to examine the manifestation of intent of the parties, not only in terms of written documents, but also in terms of the conduct of the parties. Especially important in the present case are (1) the absence of any payment of interest or monies collected during the time they are held by the collecting railroad, and (2) the commingling of the monies with general funds by the collecting railroad.

Accommodating and applying traditional common law trust principles to the unique regulatory scheme and accounting policies used by the nation's railroads, we have concluded that transportation and freight charges, *when collected,* are held in in trust for the Interlines. They are therefore entitled to have their monies.

A trust is defined in Restatement (Second) of Trusts § 2 (1959) as:

> [A] fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.

The parties' manifestation of intention ultimately controls whether or not a trust relationship exists, but failure to expressly designate the relationship as one of trust does not necessarily negate its existence. *See* United States v. Orsinger, 138 U. S. App. D. C. 403, 428 F. 2d 1105, 1112 (1970); Del Drago v. Commissioner, 214 F. 2d 478, 480 (2d Cir. 1954); State v. United States Steel Co., 12 N. J. 51, 95 A. 2d 740, 744 (1953); 1 A. Scott, Law of Trusts § 2.8 (1967). When the language of the parties fails to clearly indicate their intention, it may be ascertained by other subjective manifestations of intent, such as the facts and circumstances surrounding the transaction and the relationship of the parties. Stratford Financial Corp. v.

Finex Corp., 367 F. 2d 569, 571 (2d Cir. 1966); In re Chicago Express, Inc., 222 F. Supp. 566, 572 (S. D. N. Y. 1963); 1 A. Scott, *supra,* § 12.2, at 108.

A significant fact in the instant case warranting careful consideration is the absence of any provision for the payment of interest by the collecting carrier. Although not conclusive, its absence indicates the presence of a trust relationship. *See* United States v. Orsinger, *supra;* State v. Atlantic City Electric Co., 23 N. J. 259, 128 A. 2d 861, 865-866 (1957); State v. United States Steel Co., *supra.* A debtor-creditor relationship entails the right to use another's money, the usual quid pro quo for which is the obligation to pay interest. *See* 1 A. Scott, *supra,* § 12.2, at 108. Conversely, the collection by Penn Central as an agent of money due and owing the other railroads suggests a trust. *See, e.g.,* In re Chandler Insurance Agency, Inc., 92 F. Supp. 878 (D. Md. 1950); National Indemnity Co. v. American National Bank, 120 F. Supp. 713 (D. Minn. 1954), aff'd, 222 F. 2d 513 (8th Cir. 1955); Restatement (Second) of Trusts § 12, comment h (1959).

On the other hand, appellee trustees argue forcefully that the Interlines, by permitting Penn Central to commingle monies due them with Penn Central's general revenues, established a debtor-creditor relationship and not a trust. While generally commingling indicates a debtor-creditor relationship and not a trust, it is only one indicium and it too is not necessarily conclusive. *See* National Bank v. Insurance Co., 104 U. S. 54, 68, 26 L. Ed. 693 (1881); MacBryde v. Burnett, 132 F. 2d 898, 900 (4th Cir. 1942); State v. United States Steel Co., 12 N. J. 51, 95 A. 2d 740, 744 (1953).

Commingling of monies has minimal significance in the extraordinary operations of interline railroads. That Penn Central is not, as a destination carrier, required by the other carriers to immediately segregate funds collected does not necessarily reflect any intention to establish a debtor-creditor relationship in the face of the unique and complex interline railroad system. Normal

operation conditions with innumerable daily collections of various categories preclude practically and economically any effective daily segregation. Burlington Northern Railway alone has more than 1300 stations from which waybills are issued.[7] This is not a simple situation of one party receiving money clearly designated as payment for services performed by another. When a carrier collects funds for another railroad, it does not immediately know what portion of the revenues collected is to be allocated to other carriers.

Mr. Hill, Penn Central's Vice-President-Comptroller, testified that Penn Central settles regularly with more than 300 interline carriers. Settlement involves calculating amounts due each carrier for many different waybills sent daily to Penn Central. We recognize the enormous difficulties confronting the destination carrier to correlate each of these waybills with payments received on a monthly basis, not to mention daily basis, and to segregate funds received according to the waybills.

AAR rules merely serve to evidence the necessities of the situation. To accommodate the carriers in this exceedingly voluminous and complicated accounting system, the AAR rules require that the statements be rendered only once each month and give the carriers 18 days to prepare the abstract of the interline freight accounts after the end of the month in which the waybill is received. The rules also indicate the difficulty in segregation of collections. They require that accounts may be drawn on the collecting carrier after the specified period even though in some

7. The affidavit of Assistant Vice President Wigstrom of Burlington Northern, Inc., asserted:

> [A]t more than 1300 stations must transmit to the Company's general offices (through three regional customer accounting centers) the waybill for each shipment terminated at their respective stations. The waybill data for every terminated interline shipment must, as noted by Mr. Bergey, be abstracted in order to prepare the interline settlement statement. The settlement of interline accounts cannot be achieved either practically or economically among the nation's railroads on anything approaching a daily basis.

instances the charges have not yet been collected from the shippers.[8]

Each party in this controversy finds support for its position in a number of cases that specifically concerned interline accounts. Although we think none are directly in point with this case,[9] none rebut our conclusion that the freight and transportation collections are held in trust.

In Southern Railway Company v. United States, 306 F. 2d 119 (5th Cir. 1963), the court refused to accord priority to interline claims of the Southern Railway against the receiver of the Tallulah Falls Railway Company for amounts earned by Southern or paid by Southern to other carriers and collected by the receiver. According to the court, the freight payment first became in arrears in June 1958, and the receiver repeatedly advised Southern that it was unable to make the payments. Nonetheless, Southern made no demand for segregation of monies collected for it until May 1960. The court declined on a "laches" theory to accord the interline claims priority. It reasoned that Southern knew of the precarious financial situation of the railroad in receivership but continued to disburse its own funds to prior connecting carriers "with a full awareness that the funds were not being reimbursed by the Receiver and that, as with routine day-to-day operating charges, the Receiver was using its money, its supplies, and its facilities on which to run the Railroad." *Id.* at 125.

8. The 18-day period, in addition to facilitating accounting, preserves the fairness of the nonsegregation because most of the charges have been collected by the time of the drafting date.

9. The Interlines rely on Morgenthau v. Sugar Land Railway Company, 83 F. 2d 72, 74 (5th Cir. 1936); Baltimore & Ohio R. R. Co. v. Thompson, 80 F. Supp. 570, 586 (E. D. Mo. 1948), aff'd, 180 F. 2d 416 (8th Cir. 1950); and Atlantic Coast Line Railroad v. Pennsylvania Railroad Company, 12 F. Supp. 720 (E. D. Pa. 1935), to support their contention that the passenger and freight account monies were held in trust. Although there is dicta in each of those cases indicating that such funds collected by an interline carrier are held in trust, we do not rely extensively on that dicta, because the issue of whether or not a trust existed was not squarely presented to the court in any of the cases.

The Interlines in this case, however, were not guilty of such folly. They began demanding payment within three days of filing the reorganization petition. *Southern Railway,* moreover, does contain dictum indicating that, aside from the laches problem, the court indicated the funds collected acquired a trust character at the time the accounts were presented.[10] The court stated:

> The Receiver had a right to collect and to *retain*. The duty to remit was limited to the balance when and as struck in the periodic settlements. Only then did funds, rightfully collected and mingled, acquire a "trust" character.

306 F. 2d at 125. Applying this statement to the case sub judice, the freight accounts for the month of May 1970 acquired a trust character when stated on June 18, 1970.

In re Chicago Express, Inc., 222 F. Supp. 566 (S. D. N. Y. 1963), aff'd, 332 F. 2d 276 (2d Cir. 1964), cert. denied, 379 U. S. 879, 85 S. Ct. 146, 13 L. Ed. 2d 86 (1964), involved a claim by the Pennsylvania Railroad Company for priority in the bankruptcy of a trucking company. By agreement, Pennsylvania carried trailers of the motor carrier "piggyback" on flat cars. Pennsylvania's charges for this service depended on several variable factors, including the number of trailers transported

10. The settlement procedure in *Southern* was similar to that in this case. The court described it as follows:

> The two carriers had a junction settlement arrangement under which freight interchanged was re-billed at Cornelia. On traffic moving inbound to the Tallulah Falls, Southern paid all prior participating carriers their divisions or proportions of the revenue for traffic handled over their lines. For these advances as well as for its own division or proportions of the inbound freight charges, Southern looked to the Receiver for reimbursement and payment. As to such inbound shipments, the Receiver would, and did, collect the freights from consignees. On movements out-bound from the Tallulah Falls, the destination carrier collected the freight charges and paid over to Southern the share due it as well as the Tallulah Falls. The settlement arrangement called for adjustment four times a month. On striking the balance, payment was to be made by, or to, the Receiver or Southern as the case might be.

306 F. 2d at 123.

during a given month, the weight of the trailers, and the distances traveled. The railroad's charges were not related to the trucker's charges to its customers; the Pennsylvania made no inquiry into customer charges. The trucking company was obligated to pay within 15 days from the date of billing by Penn Central. This 15-day period was referred to by the parties in their rate agreement as a "credit accommodation" and was subject to suspension if payment was not timely. In rejecting the Pennsylvania's argument that proceeds received by the trucker from its shippers to the extent attributable to "piggy back" hauls constituted trust funds held for Pennsylvania, the court explained,

> The following are some of the facts which lead me to conclude, as did the Referee, that the relationship between the parties here was one of creditor and debtor, and not trustee and beneficiary: the absence of an agreement between the Pennsylvania and the Debtor to apportion total charges; the lack of relationship between the amount due the Pennsylvania from the Debtor and the overall charge made by the Debtor to its customer; the unconditional duty of the Debtor to pay freight charges to the Pennsylvania within fifteen days from the day of billing, and the "credit accommodation" clause in the "divisional sheet."

222 F. Supp. at 572.

These facts in *Chicago Express* clearly differentiate it from the case sub judice. Penn Central did have an arrangement with the Interlines to apportion total charges; the amounts received by the Interlines were directly related to and dependent upon charges paid by shippers; and the amounts owed to the Interlines were payable immediately upon striking the monhly settement.

Penn Central argues, however, and the district court agreed, that this issue was previously settled in In Re Central Railroad of New Jersey, 273 F. Supp. 282 (D. N. J. 1967), aff'd per curiam, 392 F. 2d 589 (3d Cir. 1968). It is true that in that case the district court held that the New York Central Railroad Company (NYC) could not set off amounts it owed the Central Railroad of New Jersey (Central) for post-reorganization freight

transportation against amounts owed by Central to it for pre-reorganization freight transportation by NYC. In reaching that result, the court concluded that the amounts collected by Central for NYC's interline service were not trust funds. 273 F. Supp. at 288. We affirmed by a per curiam opinion. To the extent the *Central Railroad* decision is inconsistent with the case sub judice, it should not be followed.

The concurring opinion expresses concern because of our reliance upon established principles of trust law which may in some future case, when possibly "the traditional indicators of a trust relationship" are absent, require a contrary holding and thus might disrupt interline railroad transportation. The principal problem before us is one of accounting for funds belonging to another, readily resolvable by recognized trust and pragmatic considerations to which we have alluded. These principles are appropriate to any industry, regardless of their operational problems, and our decision supports the congressional policy encouraging interline rail transporation of freight and passengers nationwide. We perceive no need to announce an entirely new and necessarily result-oriented rule of law which is not pertinent to our present decision, merely because of the fear that the traditional approach may be restrictive in some future unstated hypothetical situation.

III. Other Interline Accounts.

The AAR accounting system and contractual obligations for the interline accounts other than those for freight and passenger carriage present different problems. In order to ascertain whether setoffs should be allowed as to Penn Central liabilities on these accounts, it is necessary to examine them seriatim.

Car Repairs. The Interlines frequently repair the equipment of other connecting carriers under the requirements of the National Safety Appliance Act, 45 U. S. C. §13. AAR rules direct the rendition of bills for repair work no later than the

last day of the following month. A draft for payment may be drawn on or after the fifteenth of the second following month.

Overcharge and Loss and Damage Accounts. When a shipper finds too much has been charged by the railroads, or that he is due payments for loss of, or damage to, the goods shipped, he makes a claim to any carrier which participated in the shipment. That carrier investigates the shipper's claim, makes whatever payment is necessary, and then charges the responsible carrier. Accounts are stated on the 10th of each month for all shipper overcharge claims finally settled and all loss and damage claims actually paid. The carrier which has paid the claim may then draw a draft on the responsible carrier on or after the 25th day of the same month.

Per Diem Accounts. When one railroad uses the cars of another railroad, it pays that carrier a daily rental. Reports of amounts owed are forwarded to the owing carrier by the 10th day of the second month following use of the car. The net balances of these accounts are subject to immediate draft.

Switching Accounts. When one railroad switches a car for the benefit of another railroad, a switching charge is made. Such charges for cars moving in interline shipments are computed by the destination carriers and then sent to the Interlines no later than the 18th day of the month after the charges were incurred. Settlement is on the 25th day of that month.

We have concluded that amounts due on these accounts are not held in trust. These accounts do not involve collection of money by one carrier for another. These accounts merely represent the performance of services by one railroad. Although no interest was paid to Penn Central, no accounts accept for the per diem balances were subject to immediate draft as were the freight and passenger accounts. Therefore, as to these accounts, the Interlines at this juncture are in exactly the same position as other suppliers of Penn Central who were unpaid for goods and services delivered prior to the filing of the reorganization petition.

The Interlines argue that these amounts must be paid immediately because the accounts "arise directly from specific statutory requirements and are absolutely essential to the operation of a national rail transportation system." They argue that they are compelled (apparently by 49 U. S. C. § 1(4) to permit use of their box cars by Penn Central and other carriers. Similarly, the National Safety Appliance Act, 45 U. S. C. § 13, requires that they repair Penn Central's cars if they break down on their tracks. They argue that a destination carrier is required by law to process claims for damage to goods in transit and to advance monies to discharge or settle the claim.

Despite the legal obligation to perform the services, there is no compulsion, statutory or otherwise, as to the manner by which the services shall be paid. Arrangements for payment or credit are voluntary.[11] Most important, however, is the recognition that no money is collected as to these accounts by Penn Central for other railroads.

The overcharge, loss, and damage accounts present a more difficult problem conceptually. Nevertheless, the essential basis for a trust does not exist. AAR practices call for one carrier to advance sums on behalf of other carriers when valid claims are made by shippers. Such advances are, in effect, a service one carrier renders for other carriers, similar to the services the

11. The district court properly reasoned:

> While it is true that the interline railroads are required, for example, to accept from each other and to transport freight and passenger traffic and to correct unsafe conditions found on each other's cars, there is no requirement that interline railroads extend credit to each other. In fact, in proceedings leading to the entry of Order No. 9, the interline railroads detailed measures that could be taken to put a railroad, that could not be counted on to make its interline balance settlements, on a "cash" basis. *E.g.*, Tr. 23-26; Memorandum of Burlington Northern, Inc. (Document No. 18) at 5. Moreover, it is apparent that the interline railroads' description of such measures did not exhaust the list of measures that could be used to put a railroad on a cash payment rather than a credit basis. *See* Southern Ry. Co. v. Flournoy, 301 F. 2d 847, 855-856 (4th Cir. 1962) (security deposit; creditor railroads' control of car movements).

Interlines perform for each other in renting and repairing cars. In a sense, if the Penn Central receives payment for a shipment, part of which eventually has to be repaid to the shipper, it could be argued that Penn Central in the interim holds the sums in trust to return to the paying carrier. However, at the time Penn Central originally received the freight payments, it had no notice that at a later date part of those sums would have to be returned. Any overcharge, loss, or damage claims at that time would be inchoate and amorphous. The relationship between the advancing carrier and the liable carrier is thus much closer to that of debtor-creditor than that of trustee-beneficiary.

Previolusly, we upheld the reorganization court's authority to prevent banks from using the self-help remedy of setting off amounts owed them by Penn Central against their obligations to Penn Central. In re Penn Central Transportation Company, 453 F. 2d 520 (3d Cir. 1971) (the *Bank Cases*). Similarly, we have upheld its authority to enjoin shippers from setting off amounts Penn Central owed them for freight loss and damage claims against amounts they owed Penn Central for freight services. In re Penn Central Transportation Company, Nos. 72-1436 to 1438 (3d Cir. 1973) (the *Shipper Cases*).

In the *Shipper Cases*, we explained: (1) Under the Interstate Commerce Act, 49 U. S. C. §§ 3(1) and 6(7), freight charges are accorded a preferred status and are not subject to the defense that the carrier owes the shipper money for other items. We noted that the only defense that can be raised to a carrier's suit for freight charges is "that the services have been paid for, that the services were not rendered, that the services were charged under an inapplicable tariff schedule, or that the rates were unreasonable." (2) Although a shipper nevertheless retains a right to assert a counterclaim in a carrier's suit for freight charges, Chicago & Northwestern Railway v. Lindell, 281 U. S. 14, 50 S. Ct. 200, 74 L. Ed. 670 (1930), that right is extinguished by the intervention of a railroad reorganization proceeding. (3) Since the shippers' claims did not have the

legal status of defenses, they cannot defeat "the right of the railroad to collect absolutely all legal charges for freight services outstanding and unpaid."

In the *Bank Cases*, we reasoned that permitting creditors to refuse to pay their obligations because Penn Central owed them similar amounts would place them in a preferred position over other creditors and endanger the success of the reorganization. We noted: "Even secured creditors of a railroad must submit to the risk inherent in judicial suspension of the rights they normally would have to enforce their liens against property of the debtor during the pendency of a reorganization proceeding." New Haven Inclusion Cases, 1970, 399 U. S. 392, 90 S. Ct. 2054, 26 L. Ed. 2d 691 [1970]." 453 F. 2d at 523.

In this case, we reaffirm the reorganization court's authority to preclude setoffs. The threat to the reorganization that we noted in the *Bank Cases* is present in the assertion of these setoffs. Penn Central's choses in action for the various interline charges are entitled to the same status as the freight charges in the *Shipper Cases* and the deposits in the *Bank Cases*. The district court concluded that to permit setoffs could discriminate against many other suppliers of services and equipment and would be unfair because of the unresolved issue of the relative priorities of the claims. It also concluded that Penn Central's cash position would be unduly injured by allowing the setoffs.

In the absence of a trust relationship, whether to permit a setoff is in the discretion of the district court. *See* Susquehanna Chemical Corp. v. Producers Bank & Trust Co., 174 F. 2d 783, 786-787 (3d Cir. 1949). We find no abuse of discretion in the circumstances of this case.

For the foregoing reasons, the interline railroads may not set off their claims, except for freight and passenger accounts, against amounts owed by them to Penn Central. The freight and passenger claims are entitled to difference treatment because of their trust character and the Interlines' resulting right, to payment regardless of the reorganization.

IV. The Effect of Order No. 9.

[8] Order No. 9 requires Penn Central to pay all interline accounts "first stated or presented for settlement on or after [July 1, 1970]." Appellants argue that Penn Central's failure to pay for May 1970 car repairs, which became payable on or after July 1, violates the order.[12] The district court rejecting appelants' argument reasoned:

> This interpretation equates presentation of a draft and statement of the account; more importantly, it overlooks the word "first" in the Order. Accounts which were either stated or presented proir to the date of Order No. 9 were not required by that Order to be paid, and thus respondent's contentions with resepct to the Car Repair and Passenger accounts are clearly without merit.

We agree with the district court.

Appellants argue that the parties drafted the language of the order and that the testimony at the hearing prior to its issuance demonstrates that they intended it to require payment of all sums that became payable in July 1970, not just those stated for the first time in July. They note that Penn Central's Comptroller, Charles Hill, in explaining Penn Central's intention to pay "interline accounts to be presented after or scheduled to be presented after June 30," presented to the court an exhibit showing the amounts Penn Central planned to pay in July. Specifically included were drafts in the amount of $1 million for car repairs, which became subject to draft on July 15 under the AAR rules. Moreover, the note, Mr. Hill stated:

> The initial indication of actual disbursements begins with July 23 on revenue accounts, on July 13 on mileage accounts, and intermediate dates on car repairs.

12. Appellants also make this argument as to passenger accounts, but since we have concluded that the passenger receipts are held in trust, we need not specifically discuss their status under Order No. 9. In the district court, appellants also assered that unpaid miscellaneous bills were required to be paid by Order No. 9, but they do not press this contention on appeal.

The accounts that became subject to draft on July 15 would, under the AAR rules, represent May car repairs. Appellants also note that their counsel stated to the district court that if the order they proposed to the court in their motion of June 24, 1970, i.e., that Penn Central be required to pay *all* interline balances, were not granted that they would be satisfied with an order which "embraces those accounts and balances which Penn Central contemplates paying in July."

From this course of events, we conclude that the Interlines undoubtedly favored payment of interline accounts in full and that they proposed as a less drastic remedy that Penn Central be bound by its projections for July. Unfortunately, the step we cannot take is to conclude that the district court accepted either of these positions. The district court, in inviting counsel to submit an order to it, stated that it was adopting the projections:

> The order which is being entered is not to be taken as either approval or disapproval of the projections set forth in these documents or of any of the projected expenditures.

The district court explained that it desired an order separating pre-petition interline charges from post-petition interline charges. In concluded that "charges stated from and after today would represent the post-petition interline balances" and specifically asked counsel to prepare an order providing for their payment.[13]

We think the court's oral statement pertaining to its order indicates that Order No. 9 did not contemplate the payment of all accounts that would become due for payment in July. The phrase "charges stated" is most reasonably interpreted as

13. The court stated:

> From the evidence presented, it seems quite apparent that the post-petition interline charges, that is to say the charges stated from and after today would represent the post-petition inter-line balances, can be paid without unduly jeopardizing any of the other essential payments that the railroad must make.
>
> I therefore will enter an order and will invite counsel to submit the written order for entry which will make mandatory the payment of post-petition inter-line balances until further order of this Court.

meaning charges first reported in the month of July. It strains the language unduly to interpret it to mean charges which have been previously reported but for which payment becomes due in July. The stark language in the actual order, i.e., "stated or presented," could arguably be interpreted to encompass charges for which the drafts are presented in July, but we think the district court's statement to the parties as to the nature of the order he desired to enter precludes this interpretation.

We also believe that the district court's interpretation of its own order in the decision appealed from is entitled to great weight. We find no compelling basis to hold otherwise. We have already found that the parties' objections to the district court's entry of this order are without merit. They can petition the district court again if they believe that it should exercise its discretion to modify the order. We also note that the court in entering Order No. 9 provided explicitly that it would not prejudice the rights of the Interlines to claim a priority at a later time.

The order of the district court will be affirmed except as it operates to preclude the interline carriers from offsetting amounts they owe Penn Central against amounts Penn Central owes them for freight and passenger services. The Interlines shall be entitled to offset any amounts Penn Central owes them for freight and passenger services as of the date of this opinion, and Penn Central will be obligated to pay any remaining balances due for these accounts. The case will be remanded to the district court for further proceedings consistent with this opinion.

ADAMS, *Circuit Judge* (concurring):

Though I concur in the result reached in this case, I am troubled by the heavy reliance by the majority upon the time-worn tenets of trust law in dealing wtih the issues presented here. Inasmuch as this appeal involves the functioning of the national transportation network, closer attention to pragmatic factors and to Congressional pronouncements would appear to be warranted.

Congress has long been concerned with the establishment and maintenance of a viable national rail system. In part, this concern is manifested in legislation tailored to encourage and facilitate "interline" rail transportation of freight and passengers.[1] To resort, as the majority does, primarily to "traditional common law trust principles" to resolve this case is to overlook the legislative policy embedded in these pertinent statutes. Moreover, the majority's stance fails to address the practical problems confronting the railroad industry today. In this time of proliferating difficulty for the railroads, such an approach does little to advance the enterprise of "developing, coordinating, and preserving a national transportation system."[2]

Section 1(4) of the Interstate Commerce Act[3] makes it the duty of each regulated rail carrier to participate in the interstate transportation of freight and passengers. In addition, it requires that the carriers "established reasonable through routes with other such carriers, and just and reasonable rates, fares [and] charges . . . applicable thereto."[4] Carriers participating in through routes are directed to "provide reasonable facilities for operating such routes and . . . to make reasonable rules and regulations with respect to their operation . . . ." If connecting carriers fail to create voluntary through routes, section 15(3) of the Act[5] empowers the Interstate Commerce Commission, under certain conditions, to order their establishment.[6]

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1. *See, e.g.*, sections 1(4), 15(3), 15(4) and 15(6) of the Interstate Commerce Act, 49 U. S. C. §§ 1(4), 15(3) and 15(6).

2. The National Transportation Policy, 54 Stat. 899.49 U. S. C. preceding § 1.

3. 49 U. S. C. § 1(4).

4. A "through route" is an arrangement between interconnecting railroads for the continuous carriage of goods or passengers from the originating point on the line of one carrier to a destination on the line of another. *See* St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 139, 38 S. Ct. 49, 62 L. Ed. 199 (1917).

5. 49 U. S. C. § 15(3).

6. *See generally* Thompson v. United States, 343 U. S. 549, 72 S. Ct. 978, 96 L. Ed. 1134 (1952). Section 15(4) of the Act, 49 U. S. C. § 15(4), limits the power of the Commission to order a through route where to do so would force a railroad to "short haul" itself.

The policy underlying this statutory arrangement is not difficult to discern. "Interline," long-distance rail carriage over a through route obviates much of the need for duplicative, parallel rail lines. Additionally, through-route service precludes the inconvenience that would result if a shipper had to make separate arrangements with each interconnecting carrier for a long-distance haul. A vigorous and efficient interline rail network thus assures that, as the court below stated, "[t]he nation's railroads function in many ways as a single system." The sections of the Interstate Commerce Act discussed above seek to foster and preserve this unitary rail scheme.

There is no statutory compulsion for interconnecting rail carriers to utilize any particular method of collecting fares and freight charges for a through-routed shipment. But, as a practical matter, only one such method is feasible. That is for a single carrier—either the originating or the destination carrier—to collect the entire fare, and then remit to the interline carriers their pro rata portions. This arrangement is apparently subscribed to by the entire industry, and is incorporated in the rules of the Association of American Railroads. A departure from this procedure—for example, insistence by each interline carrier upon immediate payment by the shipper—might well undermine the entire system of interline rail transportation. At a minimum, it would greatly impede the smooth and efficient functioning of the through-route network.

At least one other court has concluded that, since practical considerations militate so strongly in favor of collection by a single carrier, that carrier should be deemed a "trustee" for the interline railroads.[7] Such a conclusion, when transposed to the

7. Atlantic Coast Line R. Co. v. Pennsylvania R. Co., 12 F. Supp. 720, 722-723 (E. D. Pa. 1935). In a related case, the same court described a typical interline shipment:

> "[t]he service performed was a haul of citrous fruits from Florida to delivery points in the Northern States. A number of railroads, which we shall call five, participated in order in the carriage, making of it one continuous haul. . . . The

(Continued on next page)

scenario of a railroad reorganization case, requires that the interline carriers be granted a superior status vis-a-vis the trustee-railroad's other creditors. Conveniently, there are present in this case enough of the common indicia of a fiduciary relationship to support the majority's conclusion that here, too, the Penn Central holds the interlines' freight and passenger revenues in "trust." Consequently, and I believe correctly, the majority grants the interlines the preferred position that "beneficiary" status merits under the relevant reorganization principles.

What the majority does not appear to consider, and what I suggest may be of critical importance, is the possibility that, in another case, the *absence* of any of the traditional indicators of a trust relationship would, under their view, require a contrary holding.[8] Exclusive reliance upon the precepts and terminology of trust law would seem, in such a case, to dictate that a court deny the interlines any priority over other creditors. Stripped of that priority, the interlines might well insist upon immediate payment from shippers for each segment of a long-distance haul. Such insistence, with the attendant dislocation of the through-route system, would be especially likely where, as here, the originating or destination carrier was on the verge of going into reorganization.

The disruption of interline transportation that might result from application of the majority's *ratio decidendi* to another case would seriously thwart the policy expressed in the Interstate Commerce Act. Moreover, it would tend to impede promotion of an "adequate, economical, and efficient" transportation system, thus hampering effectuation of our National Transportation

(Continued from preceding page)

> last link at the delivery end was the Pennsylvania Railroad. Because of a convenience so great as to be imperative, the Pennsylvania Company collected for the whole haul." Atlantic Coast Line R. Co. v. Pennsylvania R. Co., 12 F. Supp. at 726 (E. D. Pa. 1935).

8. Considering the turbulent, changing situation in the railroad industry, this does not seem a remote possibility.

Policy.[9] The majority does not grapple with these considerations. Its approach, while leading to a salutary result in the case *sub judice*, overlooks these broader ramifications by focusing too narrowly upon the situation at hand.

Rather than merely invoke the hoary principles of trust law to settle this case, I would treat the problem of interline freight and passenger accounts as a *sui generis* matter. Having perceived Congress' interest in creating and maintaining a viable interline rail system, it would be appropriate to hold that, even in the *absence* of anything formally resembling a "trust," the interlines are entitled to a preferred position with respect to freight and passenger revenues owed them by a railroad in reorganization.

This is not to suggest that venerated legal doctrines can never provide guidance to a court confronted with novel questions of transportation law. But where Congress has, by statute and articulation of a national policy, prompted the judiciary to consider the effects of its decisions upon the nation's entire transportation system, there does not seem to be justification for exclusive reliance upon the narrow principles of private law.[10] The demands in treating a matter of national transportation policy are best met by a candid and informed weighing of competing interests, within the compass of the judicial process, rather than by use of dogmas or labels that may prove too inflexible to solve the non-Euclidean problems that are presented.

The majority also concludes that, unlike freight and passenger revenues, other interline monies—those relating to car repairs, overcharges, freight loss and damage, per diem car rentals, and switching charges—are *not* held in "trust." Since this holding would not appear to work any substantial disruption of the interline rail schema, I concur in this aspect of the result as well.

WEIS, *Circuit Judge*, joins in this concurring opinion.

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9. *See* Note 2, *supra*, and accompanying text.

10. *Cf.* New Haven Inclusion Cases, 399 U. S. 392, 431, 90 S. Ct. 2054, 26 L. Ed. 2d 691 (1970).

STATUTORY PROVISIONS INVOLVED.

BANKRUPTCY ACT.

Section 77.

11 U. S. C. § 205(a).

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"). When any railroad, although engaged in interstate commerce, lies wholly within one State, the proceedings shall be brought in the United States district court for the district in which its principal operating office has been located during the preceding six months or the greater portion thereof. The petition shall be accompanied by payment to the clerk of a filing fee of $150. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. **If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the power conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.** Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in

which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor." Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which the other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of the other debtor; and upon the filing of the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon the court, if it approves the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to the other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 percentum of all the indebtedness of the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if the corporation has not filed a petition under this section, file with the court in which the corporation might file a petition under this section, a petition stating that the corporation is insolvent or unable to meet its debts as they mature and that the creditors have claims aggregating not less than 5 percentum of all such indebtedness of the corporation and propose that it shall effect a reorganization; copies of the petition shall be filed at the same time with the Commission and served upon the corporation. The corporation shall, within ten days after such service, answer the petition. If the answer admits the jurisdiction of the

court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If the answer denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismiss the petition. If such a petition is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. If a petition is dismissed, neither the petition nor the answer of a debtor constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this Act or in any State or United States court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition. (Emphasis supplied.)

11 U. S. C. § 205(b).

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them,

either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. **The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.**

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of

this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section. (Emphasis supplied.)

11 U. S. C. § 205(c)(2).

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. **The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracts, and terminal facilities, the trustee or trustees shall be subject to lawful orders**

of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subsection (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms and conditions as he may from time to time impose and prescribe. (Emphasis supplied.)

11 U. S. C. § 205(c)(7).

(7) **The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classifica-**

tion unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization. (Emphasis supplied.)

11 U. S. C. § 205(e).

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, **the judge shall approve the plan if satisfied that: (1) it complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders;** (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such

hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or

that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judges shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States, or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on

behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not unreasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided Further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided Further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in

his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts. (Emphasis supplied.)

11 U. S. C. § 205(l).

(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

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49 U. S. C. § 1(4).

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable

request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications, applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

49 U. S. C. § 1(10).

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

49 U. S. C. § 1(11).

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

49 U. S. C. § 1(14)(a).

(14 (a) The Commission may, after hearing, on a complaint or upon its own initiative without compliant, establish reasonable rules, regulations, and practices with respect to car

service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

49 U. S. C. § 1(17)(a).

(17) (a) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this part, and of their officers, agents, and employees, to obey strictly

and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however,* That nothing in this part shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this part and except as otherwise provided in this part.

LEGISLATIVE HISTORY.

1958 U. S. Code Cong. and Adm. News, p. 4111; Pub. L. 87-681.

BANKRUPTCY—RAILROAD REORGANIZATION.

For text of Act see p. 1156

Senate Report No. 2280, Aug. 9, 1958
[To accompany H. R. 12217]

House Report No. 2282, July 26, 1958
[To accompany H. R. 12217]

The Senate Report is set out.

Senate Report No. 2280

The Committee on the Judiciary, to which was referred the bill (H. R. 12217) to amend paragraph (2) of subdivision (c) of section 77 of the Bankruptcy Act, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to amend paragraph (2), subdivision (c) of section 77 of the Bankruptcy Act, the railroad reorganization section, to allow the debtor, with respect to safety, location of tracks, and terminal facilities, to comply with the lawful orders of a State regulatory body so that needed improvements in railroad facilities can be made prior to the confirmation of a plan of reorganization.

STATEMENT

The Interstate Commerce Commission has no objection to the enactment of the proposed legislation.

A similar bill, S. 3025 of the 84th Congress, was the object of a hearing on March 20, 1956, before a subcommittee, consisting of Senator Price Daniel, chairman, Senator Herman Welker, and Senator Joseph C. O'Mahony, of the Committee on the Judiciary. The bill S. 3025 of the 84th Congress was favorably reported by the subcommittee, was favorably reported by the committee, and was approved, as reported, by the Senate on April 26, 1956. No action was taken by the House of Representatives. The committee now has before it H. R. 12217, which has been approved by the House of Representatives, and the committee reports it favorably.

The hearings conducted in the 84th Congress by a subcommittee of this committee developed that the need for this legislation arises from a situation in the city of Miami, Fla., brought about by nearly a quarter of a century of litigation over the reorganization of the Florida East Coast Railroad. Although the reorganization court recognized the authority of the Florida Railroad and public utility commission to determine questions of public necessity, such as the erection of terminal facilities, even though the railroad was in reorganization, the court held that before the trustee could comply with the order of the commission it was necessary to secure inclusion of the plan of reorganization of adequate funds to cover he cost of erecting such new facilities. The court further require that the Interstate Commerce Commission first approve the issuance of any necessary securities and any abandonment o main-line tracks which might be involved.

The factual situation in regard to the Florida East Coast Railroad is that for nearly a quarter of a century the parties in interest have not been able to agree upon a reorganization plan acceptable to all concerned. Four proposed plans for reorganization have gone through the Interstate Commerce Commission and the Federal courts and particular aspects of the problem have been before the Supreme Court on three occasions. Meanwhile, until a reorganization plan has been formulated and approved, the city of Miami, Fla., remains burdened with an inadequate railroad station which was built

in 1914 for a city with a population of some 20,000, while today the city of Miami has a normal population of more than 800,000 and a wintertime population of nearly 2 million. In addition, grade crossings located in the downtown Miami area result in the many problems in regard to the automobile traffic of the city.

It appears to the committee that the factual situation presented by the Florida East Coast Railroad station in the city of Miami is one where the peoples' convenience, necessity, and safety justify corrective legislation, and that even if the specific problem presented in Miami should be satisfactorily settled by an acceptable plan of reorganization, the proposed legislation is desirable in order to insure that such a situation will not arise again elsewhere. The committee believes that the proposed legislation, which it reported favorably in the 84th Congress, to amend the railroad reorganization section of the Bankruptcy Act to allow a debtor, with respect to safety, location of tracks, and terminal facilities, to comply with the lawful orders of a State regulatory body so that needed improvements in railroad facilities can be made prior to the confirmation of a plan of reorganization, is meritorious and the committee recommends it favorably.

Attached and made a part of this report are—

1. A letter dated June 13, 1958, from the Interstate Commerce Commission.

2. A statement in regard to the proposed legislation from Senate Report No. 1735 of the 84th Congress, and

3. A statement in regard to the proposed legislation from House Report No. 2282 of the 85th Congress.

INTERSTATE COMMERCE COMMISSION,

Washington, D. C., June 13, 1958.

Hon. EMANUEL CELLER,

Chairman, Committee on the Judiciary,

House of Representatives, Washington, D. C.

DEAR CHAIRMAN CELLER: Your letter dated June 4, 1958, addressed to the Chairman of the Commission and requesting an expression of views on a bill, H. R. 12217, introduced by Congressman Fascell, to amend paragraph (2) of subdivision (c) of section 77 of the Bankruptcy Act, as amended, has been referred to our Committee on Legislation. After careful consideration by that Committee, I am authorized to submit the following comments in its behalf:

Paragraph (1) of section 77(c) of the Bankruptcy Act provides for the appointment of a trustee or trustees of the property of a debtor subject to the provisions of section 77, and paragraph (2) thereof, which H. R. 12217 would amend, provides, among other things, that a trustee so appointed shall have "the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor." Thus, as indicated, the trustee in operating the business of the debtor specifically is made subject to the provisions of the Interstate Commerce Act and to the jurisdiction of this Commission. However, the section is silent with respect to the applicability of State laws and the jurisdiction of State regulatory bodies to such operation. H. R. 12217 would make specific provision respecting the applicability of such laws and jurisdiction by adding the following sentence immediately after the language quoted above:

> "In operating the business of the debtor with respect to safety, location of tracks, and terminal facilties, the trustee

or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under susection (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (*a*) unless the trustee or trustees, with the approval of the court shall consent thereto, or (*b*) unless and until the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act."

The proposed amendment, however, should be considered together with the provisions of section 959(b), title 28, United States Code, which reads as follows:

> "A trustee, receiver, or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver, or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

The United States Supreme Court has stated that the obvious purpose of the foregoing provision was to negative any idea that a Federal receiver or trustee could ignore the rules of law of the State of operation affecting the conduct of the business committed to his care. (Palmer v. Webster & Atlas Nat. Bank of Boston, 312 U. S. 156, 166, 61 S. Ct. 542, 85 L. Ed. 642). This provision, which is broad enough to include a trustee of a

debtor in reorganization under section 77, has been held to subject receivers to public service regulations, workmen's compensation statutes, and applicable tax provisions.

While section 959(b), quoted above, undoubtedly is applicable to ordinary transactions incident to the conduct of a debtor railroad's business, there is some doubt under present law as to the enforcibility, without the consent of the bankruptcy court, of an order of a State regulatory body requiring construction or alteration of railroad facilities. With respect to the provisions of the antecedent law from which this section of the code was derived, the Supreme Court held that it did not restrict the power of the Federal court to preserve property in the custody of the law from external attack (In re Tyler, 149 U. S. 164, 182, 13 S. Ct. 785, 37 L. Ed. 689).

Presumably, H. R. 12217 is intended to supplement the provisions of section 959 (b) supra, and, subject to the conditions therein provided, to make it clear that a district court under whose jurisdiction a railroad is being reorganized may exercise no discretion with respect to complying with lawful orders of State regulatory bodies. As we construe the proposed amendment, an order of a State public service commission requiring construction of a new passenger station, relocation of tracks, or elimination of grade crossings, even though such projects might require the expenditure of substantial sums of money and result in diminishing the funds which otherwise might be distributable to creditors, would be enforcible without the consent of the trustee or the district court having jurisdiction of the debtor's property, provided the findings specified in the bill are made by this Commission and compliance is made with any applicable provision of the Interstate Commerce Act.

We believe that the findings which would be required to be made by this Commission under the proposed measure as a condition precedent to the enforcement of an order within the purview of the amendment would afford adequate protection to the debtor's estate and the public interest, but whether control

over such matters should be transferred from the district courts to this Commission is a question of congressional policy.

We have no objection to the enactment of H. R. 12217.

Respectfully submitted.

HOWARD FREAS,
Chairman,
ANTHONY ARPAIA,
ROBERT W. MINOR,
Committee on Legislation.

Statement from Senate Report No. 1735 of the 84th Congress.

STATEMENT

This legislation was the subject of hearings before a subcommittee of the Committee on the Judiciary on March 20, 1956, at which time testimony was heard from proponents and oponents of this legislation.

Section 77 of the Bankruptcy Act deals with the reorganization of railroads engaged in interstate commerce. As stated at the hearings, the purpose of the section is to provide a method whereby railroads may reorganize for their benefit and for the benefit of the public, it being realized that interstate railroads are a public utility in which the public has an essential interest.

The hearings show that the recommendation for this legislation rises out of a situation now existing in the city of Miami, Fla. The Florida East Coast Railroad operates out of the city of Miami, and one of the assets of this railroad now in reorganization is the Miami railroad station, which was built in about 1914. The same railroad station now exists in that city. In 1922, the total population of Miami was about 20,000, and as far back as 1922, the city of Miami complained about the inadequacy of the station. The testimony indicates that the normal year-round population of Miami is presently 850,000 and the wintertime population runs close to 2 million, and, as stated, the same station now exists in Miami as existed in 1914.

The Florida East Coast Railway went into reorganization under section 77 of the Bankruptcy Act about August 31, 1931, which is almost 25 years ago. During this period, four proposed plans of reorganization have been through the Federal courts and the Interstate Commerce Commission. The United States Supreme Court has had the matter presented to it on three occasions. It appears that the Interstate Commerce Commission has issued innumerable reports, and now has the matter before it once more, so that the situation is static as to the changing of the terminal, the building of a new station, and related matters.

It appears from the testimony given that this is caused by the objections of certain bondholders to the reorganization plans that have thus far been proposed and that, as a result thereof, needed changes in the facilities mentioned may not be had until such final plan is approved. The committee, of course, realizes that the bondholders have a right to litigate and object to a plan of reorganization, and to carry the matter to the Supreme Court of the United States if they so desire.

The committee, in reviewing this matter, bears in mind that under section 77 of the Bankruptcy Act, dealing with interstate railroads which are in financial difficulties, the power to operate and administer the railroad and to effect a reorganization as a result of which a distressed railroad can continue as a strong and effective part of our national transportation system is divided between the Federal courts and the Interstate Commerce Commission. In Palmer v. Mass., decided in 1939, which involved the reorganization of the New Haven Railroad, the Supreme Court said:

> "The judicial processes in bankruptcy proceedings under section 77 is, as it were, brigaded with the administrative processes of the Commission."

It therefore follows that the Interstate Commerce Commission is an integral part in the operation of section 77 of the Bankruptcy Act. The committee does not desire to interfere with the rights of a litigant to this proceeding but does believe that the

purpose of section 77 of the Bankruptcy Act includes the welfare of the public generally. In the situation at hand, it has been found that the public is suffering through the inability of the parties involved to reach an agreeable reorganization plan which would allow the change and improvements in the facilities mentioned.

The State of Florida has on several occasions approved and directed the changes herein sought, unavailingly. The committee is of the view that this situation has reached a point where the proposed amendment to the bankruptcy law is deemed meritorious. Not only should this particular situation be resolved, but if there be any other like situation, now or in the future, the committee believes that the amendment is necessary in order to safeguard the interests of the public generally. The bill as proposed allows both sides to be heard, so that the matter can be finally resolved. Proponents and opponents initially may be heard before the State regulatory body. In addition thereto, they may be heard before the Federal court on an order from the State regulatory body and, finally under the limitations provided in the bill, the Interstate Commerce Commission may rule upon the merits of the order as it affects the public interests. It would appear that there are many instances when this type of proceeding would inure to the benefit of the bankrupt, the bondholders, and the public at large without having to await the approval and adoption of final reorganization plans.

The Interstate Commerce Commission in its report dated February 29, 1956, which is attached hereto and made a part hereof, states that it has no objection to the enactment of S. 3025, and states, in part, as follows:

> "The proposed amendment, however, should be considered together with the provisions of section 959(b), title 28, United States Code, which reads as follows:
>
> " 'A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver, or manager according

to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.'

"The United States Supreme Court has stated that the obvious purpose of the foregoing provision was to negative any idea that a Federal receiver or trustee could ignore the rules of law of the State of operation affecting the conduct of the business committed to his care (Palmer v. Webster & Atlas Nat. Bank of Boston, 312 U. S. 156, 166, 61 S. Ct. 542, 85 L. Ed. 642). This provision, which is broad enough to include a trustee of a debtor in reorganization under section 77, has been held to subject receivers to public service regulations, workmen's compensation statutes, and applicable tax provisions. The Commission further states:

"While section 959(b), quoted above, undoubtedly is applicable to ordinary transactions incident to the conduct of a debtor railroad's business, there is some doubt under present law as to the enforcibility, without the consent of the bankruptcy court, of an order of a State regulatory body requiring construction or alteration of railroad facilities. With respect to the provisions of the antecedent law from which this section of the code was derived, the Supreme Court held that it did not restrict the power of the Federal court to preserve property in the custody of the law from external attack (In re Tyler, 149 U. S. 164, 182, 13 S. Ct. 785, 37 L. Ed. 689).

"Presumably, S. 3025 is intended to supplement the provisions of section 959(b), supra, and, subject to the conditions therein provided, to make it clear that a district court under whose jurisdiction a railroad is being reorganized may exercise no discretion with respect to complying with lawful orders of State regulatory bodies. As we construe the proposed amendment, an order of a State public service commission requiring construction of a new passenger station, relocation of tracks, or elimination of grade crossings, even though such projects might require the expenditure of substantial sums of money and result in diminishing the funds which otherwise might be distributable to creditors, would be enforcible without the consent of the trustee or the district court having jurisdiction of the debtor's property, pro-

vided the findings specified in the bill are made by this Commission and compliance is made with any applicable provision of the Interstate Commerce Act."

For all of the reasons heretofore stated, and based upon the evidence presented to the subcommittee of the Committee on the Judiciary, it is recommended that the bill, S. 3025, as amended, be considered favorably.

Statement from House Report No. 2282 of the 85th Congress:

GENERAL STATEMENT

Section 77 of the Bankruptcy Act deals with the reorganization of railroads engaged in interstate commerce and provides a means whereby those that are financially distressed may be rehabilitated with due regard for the interest of the general public in adequate transportation facilities. As such, section 77 contemplates the continued operation of a railroad during its financial reorganization; e.g., where the debtor rejects a lease of a line of railroads, section 77(c)(6) requires the former lessor to continue to operate the previously leased line or where it is found "impracticable and contrary to the public interest" for the former lessor to operate the line, section 77(c)(6) requires the former lessee to continue operation for the account of the former lessor. Provisions like 77(c)(6) are predicated upon the obvious fact that regardless of a railroad's financial condition, the public remains dependent upon it for services which it is alone in a position to provide.

Under normal conditions the nature and extent of a railroad's obligation to provide services and facilities is determined by the Interstate Commerce Commission and State regulatory bodies. The question arises, however, as to whether the fact that a railroad is in reorganization alters its amenability to the orders of such agencies. As to the Interstate Commerce Commission, section 77(c)(2) specifically subjects the trustee to the provisions of the Interstate Commerce Act and to the jurisdiction of the

Interstate Commerce Commission. As to the applicability of State law and the jurisdiction of State regulatory bodies, the section is silent.

That the Railroad Reorganization Act has not preempted the field to the exclusion of otherwise lawful State regulations has been established for some time. (Palmer v. Massachusetts, 308 U. S. 79, 60 S. Ct. 34, 84 L. Ed. 93 (1939)).

In addition, Congress has specifically indicated its intent that trustees and receivers, in general, in the Federal courts should not be immune to the regulatory power of the States. (See Palmer v. Massachusetts, 308 U. S. 79, 90, footnote 17, 60 S. Ct. 34, 84 L. Ed. 93.) Section 959(b) of title 28, United States Code, requires a trustee appointed in a cause pending in a Federal court to operate the property in his possession "according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." This provision has been held broad enough to include a trustee in a section 77 reorganization to comply with public service regulations, workmen's compensation statutes, and applicable tax laws.

Thus, while section 959(b) clearly requires compliance with State laws relating to the usual incidents of operating the debtors' business, there is some question as to the obligation of the trustee, without the approval of the reorganization court, to comply with the orders of a State regulatory body requiring the construction or modification of railroad facilities.

Although the district court in the Florida East Coast litigation recognized the jurisdiction of the State agency to order the erection of new terminal facilities and the relocations of tracks, the court would not authorize the trustee to comply with the order until the necessary financing arrangements could be made part of an overall plan of reorganization. Thus, the court insisted that its responsibilities for the financial affairs of the debtor while in reorganization gave it the power to control the trustee's com-

pliance with orders which might affect the reorganization of the debtor or the interests of its creditors.

While it is both necessary and desirable to take into account the effect of major expenditures upon a railroad's overall financial condition and also the effect of such expenditures upon the approval of a satisfactory plan of reorganization, nevertheless, making compliance with the orders of a State regulatory body dependent upon the formulation and approval of a reorganization plan raises a serious problem. If the reorganization plan is quickly formulated and approved, there is no difficulty. If the reorganization gives rise to a large amount of litigation, then badly needed facilities and services may be denied the public for substantial periods of time.

Although the committee fully agrees that recognized parties in interest have a right to object to and litigate proposed reorganizations, it is nevertheless of the view that the public's interest should not be made to hang in abeyance while innumerable motions and cross-motions are made and while appellate procedures are being exhausted. Consistent with that philosophy, this bill provides a method for enforcing certain orders of State regulatory bodies where the consent of the trustee or the approval of the reorganization court cannot be obtained.

Thus, under this bill where an order of a State regulatory body would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate and the consent of the trustee and the approval of the reorganization court cannot be obtained, an interested party may go directly to the Interstate Commerce Commission. If the Interstate Commerce Commission then finds that compliance with the order (1) will not impair the ability of the trustee or trustees to perform his or their duties to the public, (2) will not constitute an undue burden upon interstate commerce, (3) will be compatible with the public interest, and (4) will not interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor, the trustee must comply with that order provided that such compliance is consistent with the Interstate Commerce Act. It should be noted that the procedure established by this bill is limited to orders respecting safety, location of tracks, and terminal facilities.

It should also be noted that the bill specifically provides that the trustee—

> "shall be subject to the lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed * * *" There is, therefore, no intent to enlarge by this legislation what is under existing law the proper regulatory scope of the States.

In providing recourse to the Interstate Commerce Commission where the consent of the trustee or the approval of the court cannot be obtained, this bill shifts ultimate control over these matters from the reorganization court to the Commission. However, participation of the Interstate Commerce Commission in the administration of insolvent railroads is not an innovation introduced by this bill. As the Supreme Court said in Palmer v. Massachusetts (308 U. S. 79, 87, 60 S. Ct. 34, 84 L. Ed. 93):

> "From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission."

To document this conclusion, the Court in a footnote to this statement pointed out that—

> "section 77(c)(1) requires the appointment of trustees to be ratified by the Commission; section 77(c)(2) gives the Commission supervision over the compensation paid to trustees and their counsel; section 77(c)(3) permits the issuance of trustees' certificates only with the Commission's approval; section 77(c)(9) permits the Commission, on request of the court, to investigate facts pertaining to mismanagement of the debtor; section 77(c)(10) empowers the Commission to set up accounts for the allocation of earnings among the various portions of the debtor's lines; section 77(c)(11) empowers the Commission to file reports as to the debtor's property, prospective earnings, etc., and

gives to the facts stated in such reports a presumption of correctness; section 77(c)(12) gives the Commission supervision over allowances for the expenses of various parties in interest in connection with the reorganization proceedings; sections 77(d) and 77(e) give to the Commission control over any proposed plan of reorganization; section 77(p) gives to the Commission control over the solicitation of proxies or deposit agreements."

The committee believes that the authority granted to the Interstate Commerce Commission by this bill will in the future prevent the years of delay in providing badly needed facilities which has characterized the Florida East Coast situation. **The committee also believes that this bill represents a proper balancing on the one hand of the interests of the creditors in obtaining a reorganization plan which is fair to all and, on the other, of the interests of the public in adequate transportation services and facilities.** (Emphasis supplied.)

No. 76-587

Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM GIBBONS, TRUSTEE OF THE PROPERTY OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR, PETITIONER

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the trustee of a railroad in reorganization—who is empowered, under Section 77(c)(2) of the Bankruptcy Act, to operate the railroad's business "subject to * * * the jurisdiction of the [Interstate Commerce] Commission"—must comply with the Commission's car service regulations governing the settlement of pre-reorganization interline per diem accounts.[1]

---

[1]The petition for a writ of certiorari also presents the question whether the reorganization court in this case properly limited the trustee, in his collection of other interline accounts, to collecting the outstanding net balance in the debtor's favor. The Commission took no position on that question in the courts below and does not address it here.

STATEMENT

In March 1975, the Chicago, Rock Island and Pacific Railroad Company filed in the United States District Court for the Northern District of Illinois a petition for reorganization under Section 77 of the Bankruptcy Act, 47 Stat. 1474, 11 U.S.C. 205. The district court appointed petitioner William Gibbons as trustee, and the Interstate Commerce Commission thereafter approved the appointment (Pet. App. A10-A11). Under Section 77, the trustee is empowered to operate the bankrupt railroad—subject to the supervision of the reorganization court and the jurisdiction of the Interstate Commerce Commission—pending the adoption of an acceptable reorganization plan.

The question in this case is whether the trustee is required to comply with one aspect of the Commission's car service regulations governing when and in what manner railroads must pay interline per diem accounts—that is, charges for the use of another railroad's cars.

Under Section 1(14) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(4)—which requires rail carriers to establish reasonable "through routes" with other carriers—a railroad must allow its cars to be carried beyond its own lines. See *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615; *Chicago, Rock Island and Pac. Ry. Co.* v. *United States*, 284 U.S. 80, 91, 101-102. The result is that "[t]he freight cars of the Nation [are] in essence a single common pool, used by all roads." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743.

Sections 1(10) through 1(17) of the Act give the Commission comprehensive authority to regulate all aspects of car service.[2] In accordance with that authority, the

[2]Car service refers to "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to [Part I of the Act]." 49 U.S.C. 1(10).

Commission has established mandatory rules, uniformly applicable to all interlining railroads, governing per diem charges and the settlement of per diem interline accounts.[3]

In the present case, the reorganization court entered an order authorizing the trustee, in his discretion, to pay or defer payment of the Rock Island's "pre-reorganization" per diem accounts—"accounts presented for payment during the reorganization period for car use before the reorganization petition was filed" (Pet. App. A13). The trustee declined to pay per diem charges for car use during the period January through March 1975.

Twenty-three interline railroads which, like the Commission, had intervened in the reorganization proceeding (and are respondents here) petitioned the district court to order the trustee to pay the Rock Island's pre-reorganization per diem balances. The district court denied the petition (Pet. App. A1-A9).[4] While acknowledging that it was "powerless to order the Debtor and Petitioners to disregard

[3]Under those rules, as the court of appeals stated, "[p]er diem charges include a 'basic per diem' rate paid by the car-user to the car-owner to compensate the car-owning railroad for the average cost of purchasing and maintaining its cars" and "an 'incentive per diem' charge which operates to encourage the prompt return of equipment found to be in short supply" (Pet. App. A12; footnotes omitted). See *Chicago, B. & O. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176, affirmed *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 318 (D. Neb.), and *Boston & Maine R.R.* v. *United States*, 297 F. Supp. 615 (D. Mass), affirmed *per curiam*, 396 U.S. 27; *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 and 217, affirmed *sub nom. United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, and 417 U.S. 901. The Commission recently refused to exempt bankrupt and marginal railroads from the obligation to pay incentive per diem charges. *Incentive Per Diem Charges—1968*, 349 I.C.C. 303, 326-330.

[4]The district court also granted a petition by the interline railroads to instruct the trustee to collect other pre-reorganization interline accounts only to the extent of a net balance in the debtor's favor (Pet. App. A5-A9). See note 1, *supra*.

the rules of the Commission with respect to the creation of debts arising out of car hire," the court held that it was empowered to "determine the priorities among those debts created in accordance with the regulations of the Commission along with those other debts incurred by the Debtor prior to the filing of its Petition in bankruptcy" (Pet. App. A3-A4). The court concluded that it could properly leave to the trustee's discretion the payment or deferral of the pre-reorganization per diem accounts, and it declined to order the trustee to make the requested payments (Pet. App. A4, A5).

The court of appeals reversed (Pet. App. A10-A26).[5] It held that, "in view of the comprehensive regulation by the Commission of all aspects of car service and the key role which rules for settlement of per diem accounts play in that regulatory system, the payment of per diem accounts for both post- and pre-reorganization periods is properly considered as part of the operation of the railroad in reorganization under Section 77(c)(2) and is consequently governed by Commission orders" (Pet. App. A17). The court of appeals "recognize[d] that the pre-reorganization per diem accounts do represent a claim against the debtor's estate and in that sense constitute a 'debt' within the meaning of the Bankruptcy Act" (*ibid.*). It concluded, however, that "the reorganization court's power in determining the priority of that claim in relation to claims of other creditors has been circumscribed by the superseding authority of the Commission in this area" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

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[5]The court of appeals affirmed the aspect of the district court's order relating to the collection of other interline accounts (Pet. App. A21-A26).

1. Petitioner's argument, in essence, is that the Rock Island's pre-reorganization per diem obligations are "debts," the priority of which, in relation to other debts, is subject to the exclusive determination of the reorganization court. It is upon this premise that petitioner rests his contentions (1) that the court of appeals' decision improperly allows the Commission to give special priority to per diem claims (Pet. 6-10), (2) that the decision below conflicts with the "six months rule" governing preferences and priorities to certain unsecured creditors (Pet. 10-12), and (3) that the decision deprives him of property without due process of law (Pet. 14-16).

Like the court of appeals, we recognize that per diem obligations have some of the characteristics of a debt. But unlike simple "debt," the per diem account is a regulatory device crucial to the Commission's effective supervision of the national car fleet.

Section 77(c)(2) of the Bankruptcy Act, 11 U.S.C. 205(c)(2), gives the trustee of a railroad in reorganization the power to operate the railroad "subject to the control of the judge *and the jurisdiction of the Commission*" (emphasis added). Section 1(17)(a) of the Interstate Commerce Act, 49 U.S.C. 1(17)(a), specifically requires rail carriers and their operating trustees to comply with the Commission's car service orders. The court of appeals correctly concluded, in light of these provisions, that the trustee must comply with the Commission's mandatory rules governing the settlement of per diem accounts, even with respect to obligations based upon pre-reorganization car use. "Since Commission orders prescribe the *time* and *manner* of payment, the trustee is in *current* violation of Commission orders governing all operating railroads when he refuses to pay per diem accounts which become due during the reorganization period" (Pet. App. A18-A19; emphasis in original).

To excuse the trustee from the uniform obligation to settle per diem accounts would disrupt the Commission's finely tuned regulatory scheme, designed to alleviate the critical national car shortage. See *United States* v. *Florida East Coast R. Co., supra,* 410 U.S. at 230. As the court of appeals correctly stated (Pet. App. A19):

> [B]y avoiding payment of pre-reorganization per diem accounts under the Commission's uniform accounting rules, railroads in reorganization could undermine attempts to increase supply and improve allocation of the national rail car fleet. Other railroads, many of which are themselves financially troubled, would be forced in effect to subsidize the bankrupt lines for their pre-reorganization car use. Since basic per diem rates cover only an average cost of car ownership, nonpayment by bankrupt roads would result in a failure to compensate car-owning roads for the full costs of car ownership. This would tend to discourage rather than encourage car ownership and would consequently thwart recent Congressionally mandated attempts to increase car supply.

Section 77 of the Bankruptcy Act, as the court of appeals concluded, "is designed to effect reorganization without undermining or disrupting administrative regulation of the national rail system" (Pet. App. A20).

2. Petitioner's contention (Pet. 12-13) that the decision below conflicts with *In re Penn Central Transportation Co.*, 486 F. 2d 519 (C.A. 3), certiorari denied *sub nom. Chicago & North Western Transportation Co.* v. *Baker,* 415 U.S. 990, is correctly answered in the opinion of the court of appeals (Pet. App. A20-A21). Although the Third Circuit held that the reorganization court could properly authorize the trustee to defer payment of certain pre-reorganization interline accounts (including per diem accounts), the decision rested on "traditional common law trust

principles" (486 F. 2d at 524). "[N]o attempt was made in [*Penn Central*] to distinguish the per diem account from other interline accounts," and "the argument urged before [the court below] was not similarly presented in those proceedings" (Pet. App. A20).[6]

Indeed, the Third Circuit's decision was grounded in part on that court's belief that, "[d]espite the legal obligation to perform the services, there is no compulsion, statutory or otherwise, as to the manner by which the services shall be paid. Arrangements for payment or credit are voluntary" (486 F. 2d at 528). With respect to per diem accounts, however, the Commission has in fact established mandatory rules governing the manner of payment. *Rules for Car-Hire Settlement,* 160 I.C.C. 369, 165 I.C.C. 495, sustained in all material respects in *Chicago, Rock Island and Pac. Ry. Co.* v. *United States,* 284 U.S. 80.

The court below thus correctly concluded that neither its reasoning nor its result was inconsistent with that of the Third Circuit in *Penn Central.* "It is conceded in this case that trust principles do not require immediate payment of the pre-reorganization per diem accounts" (Pet. App. A20-A21). The holding of the court below that Commission regulations *do* require such payment creates no conflict requiring resolution by this Court, because the Third Circuit did not consider that issue in its *Penn Central* decision.[7]

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[6]The Commission was not a party to the *Penn Central* case.

[7]The issue is now pending before the Third Circuit in another set of appeals in the *Penn Central* litigation. *In the Matter of Penn Central Transportation Company,* Nos. 76-1862, *et al.* The cases have been briefed but oral argument has not yet been held.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1977.

DOJ-1977-01

Supreme Court, U. S.
FILED
DEC 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-587

WILLIAM GIBBONS, Trustee of the Property of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor,

Petitioner,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, and INTERSTATE COMMERCE COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*

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IN THE

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WILLIAM GIBBONS, Trustee of the Property of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*

QUESTIONS PRESENTED

The two questions presented for review are:

1. Whether the Court of Appeals erred in deciding that orders of the Interstate Commerce Commission ("Commission") prescribing the method of determining the liability of railroads to pay rental charges ("per diem" charges) to other railroads for use of freight cars, the manner and time of settlement of per diem interline balances, and the amount and structure of per diem charges, are applicable to Chicago, Rock Island and Pacific Railroad Company ("Rock Island"), a railroad in reorganization under Section 77 of the Bankruptcy Act; and

2. Whether the Court of Appeals erred in affirming the District Court's decision that the interline debts owed by other railroads to Rock Island as of the date Rock Island entered into reorganization proceedings were the net balances (if any) in the interline accounts favorable to Rock Island.

STATEMENT OF THE CASE

On March 17, 1975, Chicago, Rock Island and Pacific Railroad Company filed a petition for reorganization under Section 77 of the Bankruptcy Act. On March 28, the District Court, pursuant to Section 77(c)(1) of the Bankruptcy Act, appointed Mr. William Gibbons to act as Trustee for the Debtor. This appointment was approved by the Interstate Commerce Commission on April 8, 1975.

Various pre-reorganization interline balances were and are owed by Debtor to the twenty-three railroad respondents (referred to herein as "Interline Railroads"). Among these are undisputed balances in the per diem account owed by Debtor to Interline Railroads.

Per diem charges are the charges which each American railroad must pay for the use of another railroad's cars. In the early days of railroading, each railroad made its own arrangements with respect to obtaining and handling cars, including whether it would make its own cars available for the use of other railroads and the terms, conditions, and charges for any such use. With the enactment of the Interstate Commerce Act in 1887, the practice of interchanging cars rather than physically transferring the lading became obligatory.

The Interstate Commerce Act, as amended, authorizes the Commission to regulate every aspect of the interchange and rental of freight cars. The Commission has been empowered to (49 U.S.C. § 1(14)(a)):

> "establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices."[1]

The Commission has exercised its regulatory authority over both the manner and timing of settling interline per diem accounts, and the amount and structure of per diem charges.

The Manner And Timing Of Per Diem Settlements Has Been Prescribed By The Commission.

At an early date, the Commission exercised broad jurisdiction over the method of determining the liability and manner and time of settlement of per diem interline payments, and ordered the railroads to comply with the rules governing car-hire settlements which it prescribed. *Rules for Car-Hire Settlements*, 160 I.C.C. 369, 165 I.C.C. 495 (1930) (hereafter referred to as the "*Per Diem Rules* case"). The *Per Diem Rules* case of 1930 was instituted on the Commission's own motion and concerned "the rules for car-hire settlements between common carriers by railroad in the United States for the use and detention of freight cars while on the lines of carriers other than their owners" (160 I.C.C. at 372). The Commission considered in detail the various per diem rules enforced under the auspices of the Association of American Railroads ("AAR"), including rules dealing with per diem charges, the

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[1] Congress defined "car service" as follows (49 U.S.C. § 1(10)):

> "The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part."

methods for calculating such charges, switching reclaims, interchange and junction reports (describing transfers of cars from one railroad to another), and methods of settlement.[2]

Following its analysis of these rules and of a number of prior Commission proceedings in which per diem charges had been at issue, the Commission found certain of the per diem rules to be unreasonable, but found not unreasonable Rules 11 through 17. The Commission concluded that for the future railroads should make car-hire settlements "in accordance with the per diem rules" (160 I.C.C. at 444-45). The Commission

[2] The rules dealing with per diem settlements were summarized by the Commission as follows:

> Rule 11 (Settlement 40 days after end of calendar month; 160 I.C.C. at 396):
>
> "Rule 11 stipulates that the car owner shall be furnished with a per diem statement, within 40 days after the end of each calendar month, giving the number of days each car has been in possession of the road making the report. Upon receipt of this information it is customary for the car owner to draw on the using line for the amount reported, after deducting per diem if any, which it owes the other carrier."
>
> Rules 12-17 (160 I.C.C at 397):
>
> "Rule 12 merely states that 'the settlement of amounts accruing for the use of cars shall be made monthly without regard to reclaims pending.' Rule 13 outlines procedures and time limits, in connection with presentation of reclaim bills. Rule 14 authorizes the reclaim of per diem in instances where cars are in error delivered to the wrong railroad, or delivered without forwarding directions, etc., the erring carrier to pay the reclaim. Rule 15 relates to responsibility for per diem accruing on cars which a road refuses to receive, where no embargo has been placed. Rule 16 provides that when an embargo is laid, the issuing carrier must receive cars loaded prior to the date the embargo was issued or be responsible for the per diem accruing for each day it fails to receive such equipment. Rule 17 provides for the establishment of an arbitration committee to settle cases arising under the rules."

then ordered that the carriers "shall make car hire settlements direct with car owners in accordance with the per diem rules" (Record Doc. No. 5, attached to Affidavit of J. M. Johnson).[3]

[3] The Commission had initially decided not to make the per diem rules mandatory, but instead stated that "carriers *will be expected to modify their rules and practices to conform with our conclusions* herein. If this is not done within a reasonable period, the matter may be brought to our attention for appropriate action." (*Id.*, at 445; emphasis supplied) The carriers, however, did not voluntarily conform their rules and practices to the Commission's conclusions, but instead the AAR issued a circular to the member carriers stating that the Commission's decision did "not have the same status as an order" so that the railroads were "not legally required to comply" with that decision (165 I.C.C at 495). The Commission thereupon made its findings mandatory (165 I.C.C. at 496). Pursuant to this decision, the Commission entered its Order, dated July 15, 1930, which concluded by directing that the carriers "*shall make car hire settlements* direct with car owners *in accordance with the per diem rules*":

> "It is ordered, That respondents herein, as shown in the appendix hereto and made a part hereof, be, and they are hereby, notified and *required* to cease and desist, on or before October 1, 1930, and thereafter to abstain, from applying rules for car-hire settlements which are in conflict with *those prescribed for future application* in the next succeeding paragraphs.
>
> "It is further ordered, That the said respondents herein be, and they are hereby, notified and *required to establish*, on or before October 1, 1930, and *thereafter to maintain and observe, rules with respect to car-hire settlements* which shall provide:
>
> * * *
>
> "(4) That common-carrier railroads which interchange freight cars with more than one subscriber railroad, and which deliver to one or more subscribing carriers, freight cars which are received from another such carrier, and railroads 100 miles or more in length, regardless of the number of railroads with which they connect, *shall make car-hire settlements direct with car owners in accordance with the per diem rules.*
>
> * * *
>
> "It is further ordered, *That this order shall continue in effect until the further order of the Commission.*" (Emphasis supplied)

The Commission's order prescribing the per diem rules was sustained by the Supreme Court in *Chicago, Rock Island and Pacific Railroad Co.* v. *United States*, 284 U.S. 80 (1931). The Supreme Court there held that the Commission's power to prescribe rules with respect to "car service" included power to promulgate "rules prescribing forms and methods of accounting, reporting and distributing payments in respect of such service" (284 U.S. at 95), and ruled that the Commission's order "requires" the per diem charges to be paid in accordance with the prescribed rules (284 U.S. at 92).[4]

The Commission Has Also Prescribed The Level Of Per Diem Charges.

For more than six decades the railroads paid each other per diem amounts which were determined by the AAR. In 1953, however, the AAR sought to increase the per diem rate from $2.00 to $2.40; and several Eastern railroads refused to pay the increased amount. Thereupon, complaints were filed with the Commission seeking an order requiring all railroads to observe the AAR rates. These complaints led to the decision of the Commission in *Chicago, B. & Q. R. Co.* v. *New York, S. & W. Ry. Co.*, 297 I.C.C. 291 (1955), in which the AAR per diem rates were held to be just and reasonable and uniform per diem rates for all railroads were required. This decision was reversed on appeal in *Boston & Maine Railroad* v. *United States*, 162 F. Supp. 289 (1958), aff'd., *Boston & Maine R. Co.* v. *United States*, 358 U.S. 68 (1958), on the ground that the Commission had failed to consider certain matters, and the case was remanded to the Commission for further proceedings.

Following the remand, the Commission initiated a new proceeding under Section 1(14)(a) of the Act for the purpose of prescribing the compensation to be paid by all railroads for rental of freight cars in the future periods. During the pendency of this proceeding, Congress in 1966 enacted an

[4] The Commission's per diem settlements order remains in full force and effect today.

amendment to Section 1(14)(a) requiring the Commission, in prescribing per diem charges, to give consideration to factors affecting the adequacy of the national car supply. In response to this amendment, the Commission initiated a new, separate proceeding dealing with "incentive" per diem to determine whether incentive charges would have a favorable impact on car supply.

These two proceedings—dealing with "basic" per diem and "incentive" charges—culminated in Commission findings and orders prescribing in detail both the basic charges (on a combined time and mileage basis) and also an incentive per diem charge (applicable only to certain general service unequipped box cars) thereafter to be charged and paid by all American railroads. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176 (1968), order sustained in *Union Pacific Railroad Co.* v. *United States*, 300 F. Supp. 318 (D. Neb. 1969), *aff'd.* 396 U.S. 27 (1969); and *Incentive Per Diem Charges*, 337 I.C.C. 183, 217 (1970), order sustained in *Florida E. C. Ry. Co.* v. *United States*, 368 F. Supp. 1009 (M.D. Fla. 1973), *aff'd.* 417 U.S. 901 (1974), and 343 I.C.C. 49 (1973), 349 I.C.C. 303 (1975).

These car hire rates prescribed by the Commission were the per diem rates in effect immediately prior to the date on which the petition for reorganization was filed herein, and are the rates in effect today.

Proceedings Below With Respect To Per Diem.

The District Court recognized that it did not have power to authorize the Debtor railroad to disregard Commission orders and rules (A. 3). However, it construed the Commission's orders and rules as limited to "creation of debts"—and not as prescribing the manner and time of settlement (A. 4). It, therefore, declined to direct Rock Island to pay the pre-reorganization per diem amounts it owed to the other Interline Railroads.

The Interstate Commerce Commission and the Interline Railroads appealed from the District Court's decision to the Court of Appeals for the Seventh Circuit. The Commission advised the Court of Appeals that in its view the car-hire rules are binding on all railroads, including railroads in reorganization, and that "since per diem is in reality the cost of joint participation in the National car system binding on all railroads bankrupt or not, not only must the level of per diem be uniformly applied, but also the mechanics of settlement—the timing of payment—must be uniformly applicable throughout the industry" (I.C.C. Brief, p. 14).

The Court of Appeals reversed the District Court's decision holding that under Section 77(c)(2) of the Bankruptcy Act, which provides that the trustee shall operate the business of the debtor "subject to . . . the jurisdiction of the Commission . . ." (11 U.S.C. § 205(c)(2)), Rock Island was required to comply with the per diem rules (A. 18-19):

"In view of the mandatory nature of Commission orders governing the settlement of per diem accounts, we conclude that the trustee must pay these accounts as they become due in accordance with the per diem rules. We do not accept the reorganization court's distinction with respect to the per diem accounts between those accounts which represent pre-reorganization car use and those which represent post-reorganization car use. Since Commission orders prescribe the *time* and *manner* of payment, the trustee is in *current* violation of Commission orders governing all operating railroads when he refuses to pay per diem accounts which become due during the reorganization period. Section 77(c)(2) requires the trustee in operation of the railroad prior to adoption of the reorganization plan to comply with all orders of the Commission. It is clear to us that this provision requires compliance with Commission orders setting mandatory rules for the settlement of per diem accounts." (Emphasis in original)

Proceedings Below With Respect To Determination Of Amounts Of Pre-Reorganization Interline Balances Owed To Rock Island.

In the railroad industry, service is frequently provided to shippers on a joint or collective basis with the railroads sharing the burdens of such expenses as car ownership, repairs, loss and damage claims, overcharges, and other costs of doing business. The sharing of these costs gives rise to the need periodically to settle accounts, with debtor railroads paying creditor railroads what is owed in each of the particular interline accounts.

Pursuant to the Accounting Rules and procedures which govern the railroad industry, interline balances are settled on a net basis at periodic intervals. The amount paid is the net balance in a particular interline account favorable to a particular carrier. For example, in the car repair account, one railroad may have more credits as against another railroad (arising out of the repairs made by the former to cars owned by the latter) than debits (arising out of the repairs made by the latter to cars owned by the former). Where a railroad has such an excess of credits over debits at the end of a month, that railroad has a favorable interline balance and is entitled under the Accounting Rules to draw on the owing railroad for the amount of the net balance.

Following commencement of the reorganization proceedings, Rock Island began submitting drafts on other railroads seeking to collect—not the net balance shown in particular interline accounts—but rather the gross amount of any credits in the accounts, without regard to the fact that under the Accounting Rules the only debt to Rock Island was the net credit balance (if any) in each account.[5]

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[5] The nature of the Rock Island's position is best indicated by the per diem account between Rock Island and Santa Fe. The account showed credit entries of $182,502 for the Santa Fe and $105,821 for the Rock Island, resulting in a favorable net balance of $76,681 for the Santa Fe. Despite the fact that the Rock Island had a debit balance in this account, it nevertheless drew on the Santa Fe in the amount of $105,821 and refused to honor the Santa Fe's draft for the net balance of $76,681.

The District Court ruled that the agreement among the railroads (including Rock Island) to settle interline balances pursuant to the Accounting Rules had created a system of "mutual open accounts" between Rock Island and each of the Interline Railroads, and that under this system debits and credits within a particular account extinguish each other as they arise leaving only the net balance (A. 8). Thus, the only debt owed by each of the Interline Railroads to Rock Island for the pre-reorganization period was the net balance (if any) in any such account favorable to Rock Island.

The Court of Appeals affirmed, holding that under the railroad Accounting Rules the only debt which Rock Island was entitled to collect from each of the Interline Railroads was the favorable net balance (if any) in each account (A. 25):

> "There is, in effect, *no* debt for the gross credits on either side. Because of this feature of the interline accounts, the reorganization court concluded, and we agree, that the trustee's attempt to present drafts for the gross credits in favor of the Rock Island on pre-reorganization interline accounts was improper."

ARGUMENT

1. Rock Island's petition seeking review of the Court of Appeals' decision requiring compliance with the Commission's per diem rules and orders makes essentially two points. Rock Island first contends that this case presents an important unresolved issue of law dealing with the respective jurisdictions of the Commission and the Bankruptcy Courts (Petition, p. 6). It then argues that the decision of the Court of Appeals is contrary to decisions of this Court (*id.*, at 10) and a decision of the Court of Appeals for the Third Circuit (*id.*, p. 12), and that these conflicts should be resolved by this Court.

There is no important unresolved issue of law in this case. The issue of whether a railroad in reorganization must continue to comply with orders of the Interstate Commerce Commission

while in reorganization was resolved long ago by Congress. The Bankruptcy Act expressly provides that a debtor in Section 77 reorganization must comply with the Commission's orders. Section 77(c)(2) of the Act states that the trustee shall operate the business of the debtor "*subject to . . . the jurisdiction of the Commission . . .*" (11 U.S.C. § 205(c)(2)) (emphasis supplied):

> "The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to Section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, *subject to* the control of the judge and the *jurisdiction of the Commission* as provided by chapter 1 of Title 40 as on August 27, 1935, or thereafter amended, *the power to operate the business of the debtor.*" (Emphasis supplied)

Section 77(c)(2) thus makes it clear that a railroad in a Section 77 reorganization must operate its business subject to outstanding Commission orders, including orders which prescribe the manner and time of payment and the amount of per diem charges.

The Interstate Commerce Act, like the Bankruptcy Act, also makes it clear that the debtor in Section 77 reorganization must comply with orders of the Commission. Section 1(17)(a) of the Act (49 U.S.C. § 1(17)(a)) deals with "*directions of the Commission as to car service*" and provides that: "It shall be the duty of *all carriers* by railroad . . . , and of their officers, agents, and employees, *to obey strictly and conform promptly to such orders or directions of the Commission* [dealing with car service]. . . ." Section 1(17)(a) then specifically provides that the duties of obedience extend to carriers in reorganization and their trustees:

> "[I]n case of failure or refusal on the part of any carrier, *receiver, or operating trustee* to comply with *any such order* or direction, such carrier, *receiver, or trustee shall be liable*

to a penalty of not less than $100 nor more than $500 for each such offense. . . ." (Emphasis supplied)

Thus, Section 1(17)(a) expressly requires that orders involving car service, including orders with respect to payment of compensation to owning lines, must be complied with by a "receiver" or an "operating trustee" or a railroad in reorganization, such as Rock Island.

Recent judicial and Commission decisions emphasize the principle that debtor railroads in reorganization must comply with outstanding Commission orders. *In re Lehigh Valley Railroad Co.*, 508 F.2d 332 (3rd Cir., 1975); *Incentive Per Diem Charges*, 349 I.C.C. 303 (1975).[6] See also *Palmer* v.

[6] The Commission in *Incentive Per Diem Charges*, 349 I.C.C. 303 (1975), recognized that the burden of maintaining the national freight car fleet is a burden borne in common by the railroad industry, and ruled that exemption from the operation of the per diem orders—even for bankrupt railroads—would be unfair to the car-owning railroads and contrary to the public interest. The Commission was asked to exempt certain railroads in reorganization and other marginal carriers from payment of incentive per diem rates. The Commission agreed with the Administrative Law Judge that the request for exemption should be denied (349 I.C.C. at 327):

> "[T]he position of the bankrupt and marginal railroads had no merit because they sought, in effect, to require the car-owning railroads to subsidize them. . . .[E]xempting these latter railroads would put added pressure on non-bankrupt debit lines, and granting bankrupt and marginal railroads an exemption might cause them to be discriminated against by non-exempt lines."

The Commission quoted with approval from the initial decision of the Administrative Law Judge, as follows (*id.*, at p. 328):

> "We now come to the bankrupt and marginal railroads who seek exclusion because of their financial difficulties. These carriers are part of the national system of railroads and their obligation to provide the nation's shippers with reasonable service on request is not different from that of other companies. . . .The circum-

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Massachusetts, 308 U.S. 79 (1946); *New Haven Inclusion Cases*, 399, U.S. 392 (1970); *Smith* v. *Hoboken*, 328 U.S. 123 (1946); *Thompson* v. *Texas Mexican Ry. Co.*, 328 U.S. 134 (1946). As this Court held in *Palmer* v. *Massachusetts*, 308 U.S. at 86-7:

> "[A]n insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system . . . [T]he whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates."

Nor is there any conflict among the Circuits to be resolved. The decision of the Court of Appeals for the Third Circuit, in *In re Penn Central Transportation Company*, 486 F.2d 519 (3rd Cir., 1973), is not inconsistent with the decision of the Seventh Circuit since the Third Circuit gave no consideration whatever to the Commission's orders prescribing the manner and time of making per diem settlements. Accordingly, the Third Circuit did not reach the question of whether a railroad in reorganization may be relieved of its obligation to comply with such orders.

In the *Penn Central* litigation, the Court of Appeals held that traditional trust principles required payment of the bal-

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> stances of the financially needy roads cannot be attributed to the car owning railroads and it would be inequitable to require the car owning railroads to subsidize carriers who are in financial distress."

Accordingly, the Commission concluded that the carriers seeking exemption had "failed to justify" any such exemption, since "the inevitable effects of granting an exemption to a group of carriers would be detrimental to the nonexempt carriers and to the total incentive per diem program." (349 I.C.C. at pp. 329-330) Petitioner conceded in the Court of Appeals that the Commission's order in the *Incentive Per Diem* case "clearly falls within the regulatory power of the Commission" (Brief, p. 11).

ances due in the freight and passenger interline accounts but declined to extend this holding to the other interline accounts, stating (486 F.2d at 528):

> "We have concluded that amounts due in these accounts [other than freight and passenger] are not held in trust. These accounts do not involve collection of money by one carrier for another. These accounts merely represent the performance of services by one railroad."

The Third Circuit did not refer to or consider the per diem rules prescribed by the Commission, nor did it address itself at all to the question of whether the railroad in réorganization (Penn Central) could be relieved of its obligations under those orders. The Court of Appeals for the Seventh Circuit, in the instant case, correctly rejected the argument that the *Penn Central* decision constituted a controlling precedent, stating (A. 20-21):

> "The result in *Penn Central* was reached by an application of trust principles. It is conceded in this case that trust principles do not require immediate payment of the pre-reorganization per diem accounts. While the existence of a trust relationship may require payment of passenger and freight accounts, as the court found in *Penn Central*, it is not conversely true that, in the absence of a trust relationship, payment of per diem accounts is *not* required. We view the question before us as essentially a question of statutory construction and have resolved it upon a consideration of the applicable provisions of Section 77 and the policies they represent. We do not believe that our reasoning or the result we have reached is in conflict with the decision of the Third Circuit."

That there is no conflict between the decision below and any decision of the Court of Appeals for the Third Circuit with respect to the issue here presented is confirmed by the recent decision of that Court in *In re Lehigh Valley Railroad Co.*, 508 F.2d 332 (3rd Cir., 1975). In that case, trustees for the Penn Central secured an order requiring payment of certain interline balances by the Lehigh Valley. On appeal, Lehigh Valley asserted that a condition of the 1968 merger between the Penn Central and the New York Central, imposed by the Commis-

sion in its order approving the merger, required the Penn Central to keep the Lehigh Valley operational. Appellants contended that the Penn Central, which was then in reorganization, was fully bound by the conditions which the Commission had imposed and that this condition precluded the trustees' demand for current payment of net interline balances. In a unanimous opinion, the Court of Appeals for the Third Circuit held that the Penn Central reorganization court was without authority to vary the conditions imposed on the railroad by order of the Commission, which remained binding on the railroad in reorganization (508 F.2d at 338):

> "*The reorganization court was without authority to vary the conditions of Penn Central's franchise. Only the appropriate regulatory agency could do so. Smith* v. *Hoboken R.R. Co.*, 328 U.S. 123 (1946); *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939); *In re Central Railroad Co.*, 485 F.2d 208 (3rd Cir. 1973), cert. denied, 414 U.S. 1131 (1974). *Trustees appointed under § 77 of the Bankruptcy Act are subject to the jurisdiction of the Commission, and a modification of condition 14 would have required application to that agency* in addition to approval by the reorganization court. § 77(c)(2), 11 U.S.C. § 205(c)(2). . . ."[7] (Emphasis supplied.)

Accordingly, the Court of Appeals' decision enforcing the Commission's per diem rules and orders is fully supported by the applicable statutory authorities and judicial precedents, and is fully consistent with the decisions of this Court and the Court of Appeals for the Third Circuit.[8]

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[7] Petitioner also errs in asserting (Petition, pp. 10-11) that the decision below is in conflict with the decision of this Court in *Fosdick* v. *Schall*, 99 U.S. 235 (1878). The *Fosdick* case was not cited by Rock Island to either court below and was not mentioned in the Court of Appeals' decision. *Fosdick* involved the "six months rule" under which certain debts incurred during the six month period prior to reorganization may be paid in certain circumstances. The decision below was not based on the six months rule, but was instead based on the Commission's per diem rules and orders.

[8] Petitioner also claims that the decision below would result in the "taking of the Trustee's property and the Debtor's estate without

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2. The decision below affirming the District Court's decision that the only interline debts owing to Rock Island are the net balances favorable to it in particular accounts is not mentioned in Petitioner's "Questions Presented" (Petition, p. 2), and is discussed only briefly in the petition (pp. 5, 12). The Court of Appeals' decision on this point was based on the essentially undisputed fact that the interline accounts of the railroads are "mutual open accounts" in which the day-to-day debits and credits within particular accounts are mutually extinguished as they arise, leaving only the net balance (A.24).[9] The decision involved no important unresolved question of federal law at all, let alone one involving any conflict with decisions of other courts. In all other railroad reorganizations, the interline accounts have been settled on a net basis (A.25, fn.).

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due process or . . . without just compensation" in violation of the Fifth Amendment. Petitioner cites no authority for this theory of constitutional law, and it is plainly wrong.

[9] Petitioner, in the only argument portion of the petition dealing with the matter of determination of net balances owed to Petitioner, asserts that the netting process occurring in the mutual open accounts amounts to a "set-off" (Petition, p. 12). This is not correct. The mutual extinguishing of debits and credits in mutual open accounts occurs on a day-to-day basis as those debits and credits arise; thus, the only debt in any account to Rock Island on the date that railroad entered reorganization was the favorable net balance (if any) in such account. The courts below did not authorize or condone any setting-off of any such pre-reorganization debt owed to Rock Island by another railroad against any debts owed by Rock Island to such other railroads.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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